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No. 9769

United States Circuit Court of Appeals

FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

FEDERAL MOTOR TRUCK COMPANY,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

TRANSCRIPT OF RECORD

Original Transcript Filed March 14, 1944

LESLIE WHARTON, PUBLISHER, CINCINNATI, OHIO 4-13-44-25

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IN THE

United States Circuit Court of Appeals

FOR THE SIXTH CIRCUIT

No. 9769

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

vs.

FEDERAL MOTOR TRUCK COMPANY,
RESPONDENT.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Filed March 14, 1944)

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C., § 151 *et seq.*), respectfully petitions this Court for the enforcement of its order against respondent, Federal Motor Truck Company, Detroit, Michigan, and its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of Federal Motor Truck Company and Amalgamated Protection Local No. 114, U. A. W. - C. I. O., Cases Nos. R-5356 and 7-C-1209."

In support of this petition, the Board respectfully shows:

(1) Respondent is a Michigan corporation, engaged in business in the State of Michigan, within this judicial circuit, where the unfair labor practices occurred. This Court

therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof, certified by the Board and filed with this Court herein, to which reference is hereby made, the Board on January 29, 1944, duly stated its findings of fact, conclusions of law, and order directed to respondent and its officers, agents, successors, and assigns. The aforesaid order provides as follows:

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Federal Motor Truck Company, Detroit, Michigan, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Amalgamated Plant Protection Local No. 114, U.A.W. - C.I.O., as the exclusive representative of all its plant protection employees at its three Detroit plants, excluding the plant engineer, the assistant chief of plant protection, and all supervisory employees, in respect to rates of pay, wages, hours of employment, and other conditions of employment:

(b) Engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Amal-

gamated Plant Protection Local No. 114, U.A.W. - C.I.O., as the exclusive representative of all its plant protection employees at its three Detroit plants, excluding the plant engineer, the assistant chief of plant protection, and all supervisory employees, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Post immediately in conspicuous places at its plants in Detroit, Michigan, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a) and (b) of this Order, and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of this Order;

(c) Notify the Regional Director for the Seventh Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

3. On January 29, 1944, the Board's decision and order was served upon respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Messrs. Beaumont, Smith and Harris, respondent's attorneys in Detroit, Michigan.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, the Board is certifying and filing with this Court the transcript of the record in the proceeding before the Board, including the pleadings, testimony, evidence, findings of fact, conclusions of law, and order of the Board.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon set

forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring respondent and its officers, agents, successors, and assigns, to comply therewith.

NATIONAL LABOR RELATIONS BOARD,
(s) HOWARD LICHTENSTEIN,
Assistant General Counsel.

Dated at Washington, D. C.,
this 10th day of March, 1944.

DISTRICT OF COLUMBIA, ss:

Howard Lichtenstein, being first duly sworn, states that he is Assistant General Counsel of the National Labor Relations Board, petitioner herein, and that he is authorized to and does make this verification in behalf of said Board; that he has read the foregoing petition and has knowledge of the contents thereof; and that the statements made therein are true to the best of his knowledge, information and belief.

(s) HOWARD LICHTENSTEIN,
Assistant General Counsel.

Subscribed and sworn to before me this 10th day of March 1944.

(SEAL) (s) JOHN E. LAWYER, *Notary Public,*
District of Columbia.

My Commission Expires August 31, 1944.

ANSWER OF FEDERAL MOTOR TRUCK COMPANY TO THE PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR THE ENFORCEMENT OF ITS ORDER

(Filed March 17, 1944)

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

Answering the "Petition for Enforcement of an Order of The National Labor Relations Board", the Federal Motor Truck Company, respondent, states:

1. Answering paragraph (1), respondent admits the contents thereof, excepting that it denies that the alleged unfair labor practices occurred.

2. Answering paragraph (2), respondent admits the contents thereof, but denies that the conclusions arrived at by the Board in its findings and orders have any support in the facts or the law.

3. Answering paragraph (3), respondent admits the contents thereof.

4. Answering paragraph (4), respondent admits the contents thereof.

Further answering said Petition, respondent denies that the Board is entitled to the relief for which it prays and respectfully alleges the following without waiving any one reason because of any other reason or reasons:

A. The Board erred in failing to hold that the militarized plant protection force are not employees within the meaning of the Act.

B. The Board erred in failing to hold that the militarized plant protection force is a part of supervision and management, and, therefore, not within the Act.

C. The Board erred in holding that the granting of collective bargaining to the militarized plant protection force effectuates the policy of the Act.

D. The Board erred in holding that the militarized plant protection force constitutes, under the Act, a unit, appropriate for the purposes of collective bargaining.

E. The Board erred in failing to hold that, because of the written collective bargaining contracts between the Company and the Union, the Union is barred from representing, for the purpose of collective bargaining, the members of the plant protection force and barred from accepting them into membership.

F. The Board erred in failing to hold that, because of its contractual obligations, the Union can not act as the bargaining agent for the plant protection force.

G. The Board erred in failing to hold that the Union is estopped because of the collective bargaining provisions to represent the plant protection force.

H. The Board erred in holding that Section 2 of Article I of the collective bargaining contracts is invalid.

I. The Board erred in failing to hold that it is not within its legal discretion to find that this plant protection force constitutes an appropriate bargaining unit.

J. The Board erred in failing to find that it is inconsistent with the prosecution of the war effort to certify this militarized plant protection force as a bargaining unit.

K. The Board erred in failing to hold that it is contrary to public policy to include this militarized plant protection force within the benefits of the Act.

L. The Board failed to hold that to grant the relief requested is contrary to the purposes and policies of the National Labor Relations Act and other enactments of the Congress.

M. Inasmuch as the provision in the collective bargaining contracts has been in effect since at least April 1, 1942, the Board should have found that it cannot act in this matter because of the Labor-Federal Security Appropriation Act (Act of July 12, 1943, 78th Congress, c. 221, P. No. 135, Title IV).

N. The Board erred because there is no testimony that what has occurred here has a close, intimate and substantial relation to trade, traffic and commerce between the states and with foreign nations and tends to lead to a

labor dispute burdening and obstructing commerce and the free flow of commerce.

O. The Board erred in ordering respondent to cease and desist from "engaging in any like or related acts or conduct."

P. The Board erred in ordering respondent to cease and desist from "engaging in any like or related acts or conduct interferring with, restraining, or coercing its employees . . .", inasmuch as it is undisputed that respondent has had amicable collective bargaining relations with its productive employees and inasmuch as only the plant protection force is here involved.

Q. The Board erred in requiring respondent to post notices "in conspicuous places" in all its plants rather than merely in the assembly room of the employees involved in this matter.

R. The Board erred in finding respondent guilty of any unfair labor practice.

S. The Board erred to the prejudice of the respondent in admitting into evidence in the Representation case the Board's Exhibit 4.

T. That the Board erred in not holding that the plant protection force constitutes an auxiliary of the military police and, therefore, they are not employees within the meaning of the Act.

U. That there is no substantial evidence to support the finding of the Board that the plant protection force is not clothed with supervisory authority over the production employees of the Company.

Wherefore, the Company prays this Honorable Court that it set aside the order of the Board in whole or such prayer be denied that it set aside the order of the Board in such part as the same is not supported by evidence, or is contrary to law, as is hereinbefore in this answer set forth with particularity, and in so far as the order is so set aside that the Court relieve the Company, its officers,

agents and representatives of any necessity to comply therewith.

FEDERAL MOTOR TRUCK COMPANY,
By ALBERT E. MEDER,
Its Attorney.

BEAUMONT, SMITH & HARRIS,
Attorneys for Federal Motor Truck Co.
11th floor Ford Bldg.,
Detroit 26, Michigan.

STATE OF MICHIGAN }
COUNTY OF WAYNE } ss:

Albert E. Meder, being duly sworn, deposes and says that he is a member of the firm of Beaumont, Smith & Harris and has principal charge of this matter; that he has read the foregoing answer subscribed by him in behalf of the Company and has knowledge of the contents thereof and that the same is true to the best of his knowledge and belief; and that he was authorized for and in behalf of the Company to affix its signature hereto.

ALBERT E. MEDER.

Subscribed and sworn to before me this 16th day of March, A. D. 1944.

(SEAL) HILDEGARDE BOLLMANN, *Notary Public*,
Wayne County, Michigan.

My commission expires: Aug. 20, 1945.

STATE OF MICHIGAN, }
COUNTY OF WAYNE } ss:

Albert E. Meder, being duly sworn, deposes and says that he is a member of the firm of Beaumont, Smith & Harris and has principal charge of the within matter; that he did on the 16th day of March, 1944 serve a true copy of the attached "Answer of the Federal Motor Truck Company to the Petition of the National Labor Relations

Board for the Enforcement of its Order" upon the National Labor Relations Board by placing the same on said date in the United States mail, postage prepaid, at Detroit, Michigan, addressed "National Labor Relations Board, Washington, D. C."

ALBERT E. MEDER.

Subscribed and sworn to before me this 16th day of March, A. D. 1944.

(SEAL) HILDEGARDE BOLLMANN, *Notary Public*, Wayne County, Michigan.

My commission expires: Aug. 20, 1945.

BOARD'S DESIGNATION

(Filed March 14, 1944)

Comes now the National Labor Relations Board, petitioner herein, and pursuant to Rule 15 (5) of this Court, files this designation of the portions of the transcript of the record herein to be contained in the printed record.

A. Petition for enforcement, any responses filed thereto, and this designation of record.

B. Certificate of the National Labor Relations Board, together with the following items thereof:

The following Items of the Board's Certificate of Record;

R-5356 (VII-R-1409)

Item 1.—The entire stenographic transcript of testimony, together with the following Exhibits: Board Exhibit 1, 3; Respondent's Exhibit 3 (only page 1); excerpts of Union's Exhibit 1, page 1 as far as paragraph c, page 7 beginning with paragraph b as

far as paragraph c, page 8 paragraphs f and h including subsections (1) and (2) of h, page 9 paragraphs 7 as far as c, page 10 paragraph c subsection (1) only: Items 2, 3, 4, 5—(except sample of official ballot), 6—(except affidavit of service).
7-C-1209

7-C-1209

Item 7.—Stenographic transcript of testimony together with Board Exhibits 1a, 1c, 2, 4-A, and 4-B; Items 10 and 11—(except affidavit of service).

(s) HOWARD LICHTENSTEIN,
Assistant General Counsel,
NATIONAL LABOR RELATIONS BOARD.

Dated at Washington, D. C.,
this 10th day of March, 1944.

RESPONDENT'S DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD

(Filed March 17, 1944)

Now comes the Respondent Federal Motor Truck Company by its counsel and designates the following portions of the transcript of the record herein to be contained in the printed record in addition to the portions heretofore designated by the National Labor Relations Board:

VII-R-1409

Board's Exhibit 4.

Sections 1, 2, 4, and 9 of Article 6 and Section 1 of Article 18 of Respondent's Exhibit 1.

Respondent's Exhibit 2.

The first paragraph; Section 1 and 2 of Article I; and Article VIII with signatures of Respondent's Exhibit 3.

Respondent's Exhibit 4.

Respondent's Exhibit 5 together with the agreement attached thereto.
Respondent's Exhibit 6.
Respondent's Exhibit 7.
All of Union's Exhibit 1.

7-C-1209

The first paragraph; Section 1 and 2 of Article I; and Article VIII with signatures of Company's Exhibit 1.

BEAUMONT, SMITH & HARRIS,
Attorneys for Respondent,
By ALBERT E. MEDER,
11th floor Ford Bldg.,
Detroit 26, Michigan.

Dated at Detroit, Michigan,
this 16th day of March, 1944.

STATE OF MICHIGAN, } ss:
COUNTY OF WAYNE }

Albert E. Meder, being duly sworn, deposes and says that he is a member of the firm of Beaumont, Smith & Harris and has principal charge of the within matter; that he did on the 16th day of March, 1944 serve a true copy of the attached "Respondent's Designation of Additional Portion of the Record" upon the National Labor Relations Board by placing the same on said date in the United States mail, postage prepaid, at Detroit, Michigan, addressed "National Labor Relations Board, Washington, D. C."

ALBERT E. MEDER.

Subscribed and sworn to before me this 16th day of March, A. D. 1944.

(SEAL) HILDEGARDE BOLLMANN, *Notary Public,*
Wayne County, Michigan.

My commission expires: Aug. 20, 1945.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

(Signed March 10, 1944)

The National Labor Relations Board, by its Chief of the Order Section, duly authorized by Section I of Article VI, Rules and Regulations of the National Labor Relations Board—Series 3, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of a proceeding had before said Board, "In the Matter of Federal Motor Truck Company and Amalgamated Protection Local No. 114, U.A.W. - C.I.O.," the same being known as Cases Nos. R-5356 and 7-C-1209, such transcript including the pleadings, testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

R-5356 (7-R-1409)

(1) Stenographic transcript of testimony before Robert J. Wiener, Trial Examiner for the National Labor Relations Board on May 14, 1943, together with all exhibits introduced in evidence.

(2) Copy of respondent's letter, dated May 19, 1943, requesting oral argument before the Board.

(3) Copy of letter, dated June 2, 1943, denying respondent's request for oral argument before the Board.

(4) Copy of Decision, Findings of Fact, and Direction of Election issued by the National Labor Relations Board June 8, 1943.

(5) Copy of report on ordered election, dated July 6, 1943, together with official ballot.

(6) Copy of Certification of Representatives issued by the National Labor Relations Board on July 16, 1943, together with affidavit of service.

7-C-1209

(7) Stenographic transcript of testimony before John H. Eadie, Trial Examiner for the National Labor Rela-

tions Board on November 15, 1943, together with all exhibits introduced in evidence.

(8) Copy of the Intermediate Report of Trial Examiner Eadie, dated November 23, 1943. (attached to Item 11 hereof).

(9) Copy of order transferring the case to the Board, dated November 25, 1943.

(10) Copy of respondent's exceptions to the Intermediate Report, dated December 6, 1943.

(11) Copy of Decision and Order issued by the National Labor Relations Board January 29, 1944, with Intermediate Report annexed together with affidavit of service thereof.

IN TESTIMONY WHEREOF the Chief of the Order Section of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 10th day of March 1944.

JOHN E. LAWYER,
Chief, Order Section,
National Labor Relations Board.

CASE No. VII-R-1409

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

SEVENTH REGION

In the matter of— FEDERAL MOTOR TRUCK COMPANY, and AMALGAMATED PLANT PROTECTION LOCAL UNION No. 114, UAW-CIO	Case No. VII-R-1409

PETITION FOR INVESTIGATION AND CERTIFICATION OF REPRESENTATIVES PURSUANT TO SECTION 9 (c) OF THE NATIONAL LABOR RELATIONS ACT

Board's Exhibit No. 1

(Filed April 6, 1943)

1. Name of employer—Federal Motor Truck Company.
2. Address—5780 Federal Avenue, Detroit, Michigan.
3. General nature of business—Manufacture of War Trucks.
4. Description of the bargaining unit which petitioner claims is appropriate—Plant Protection Employees excluding the chief or anyone acting in a supervisory capacity.
5. Approximate number of employees in such unit—16.
6. Approximate total number of employees in plant or plants involved—600.
7. Number or percentage of employees in such unit who have designated or selected petitioner to be their representative for collective bargaining—12.
8. Who is the present bargaining representative of employees?—No one.

Petition for Investigation and Certification of Representatives

9. Names, addresses, and affiliation of any other known individuals or labor organizations who claim to represent any of the employees in such bargaining unit—None.
10. Is there an existing or recently expired contract and if so give expiration date?—No.
11. The undersigned hereby alleges that a question has arisen concerning the representation of the employees in the above bargaining unit, in that: The petitioning union feels that it must appeal to the N.L.R.B. for recognition inasmuch as the Company refuses to answer letter sent them on March 29, 1943.

The undersigned further alleges that said question concerning representation is a question affecting commerce within the meaning of said act.

The undersigned requests that pursuant to section 9 (c) of the National Labor Relations Act, the National Labor Relations Board investigate such controversy and certify to the parties the name or names of the representatives that have been designated or selected by said employees.

Name and address of employees or representatives filing the petition. (If made by a labor organization, give also the full name, local number and affiliation of the organization and the name and official position of the person acting for the organization.)

AMALGAMATED PLANT PROTECTION LOCAL UNION No. 114, UAW-CIO,
IRVING E. GRIFFETH, *President*,
907 Hofmann Bldg., CA 5490.

Subscribed and sworn to before me this 5th day of April, 1943 at Detroit, Michigan.

(SEAL) CHESTER MARTIN WHEELER, *Notary Public*,
Wayne County, Michigan.

My commission expires July 2, 1944.

NOTICE OF HEARING

(Signed May 7, 1943)

The Petitioner, above named, having heretofore filed with the National Labor Relations Board, Seventh Region, a Petition for Investigation and Certification of Representatives, pursuant to Section 9 (c) of the National Labor Relations Act, 49 Stat. 449, copy of which Petition is hereto attached, and it appearing to the National Labor Relations Board that a question affecting commerce has arisen concerning the representation of employees described by such Petition,

YOU ARE HEREBY NOTIFIED that pursuant to Section 9 (c) of the Act, on the 14th day of May, 1943, at 10:00 A. M. in the Hearing Room at 1332 National Bank Building, Detroit, Michigan, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board upon the question of representation affecting commerce which has arisen, at which time and place you will have the right to appear in person or otherwise, and give testimony.

IN WITNESS WHEREOF, the National Labor Relations Board has caused this, its Notice of Hearing, to be signed by the Regional Director for the Seventh Region on this 7th day of May, 1943.

HAROLD A. CRANEFIELD,
Acting Regional Director,
National Labor Relations Board.

STATEMENT OF REGIONAL DIRECTOR CONCERNING CLAIMS OF AUTHORIZATION FOR THE PURPOSE OF REPRESENTATION

The undersigned, Regional Director for the National Labor Relatioins Board, Seventh Region, has investigated the petition filed by Amalgamated Plant Protection Local Union No. 114, UAW-CIO.

In connection with the investigation petitioner has submitted in support of its claim of substantial membership 15 authorization cards which contain the following language among other recitals;

> I hereby designate, select and empower the International Union, United Automobile, Aircraft, & Agricultural Implement Workers of America (UAW-CIO), as my representative for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment; and I hereby revoke every selection or designation which in any manner may heretofore have been made by me, or any other representative for any of such purposes.
>
> I further authorize the International Union, United Automobile, Aircraft, & Agricultural Implement Workers of America (UAW-CIO) to appear and act for me and in my behalf before any board, court, committee or other tribunal in any matter affecting my status as an employe or as a member of the International Union, United Automobile, Aircraft, & Agricultural Implement Workers of America (UAW-CIO).
>
> I further specifically repudiate any organization which uses the name "International Union, United Automobile, Aircraft, & Agricultural Implement Workers of America" (UAW-CIO) but which is not affiliated with the CIO.

1. These cards were dated as follows:

   14 in March 1943
   1 undated

2. All 15 of said authorization cards bear signatures which appear to be genuine original signatures.

3. All 15 of said authorization cards bear the names of persons appearing on the Company's pay roll submitted April 26, 1943, and fall within the unit claimed by the petitioner as appropriate. This pay roll lists 18 persons in the alleged appropriate unit.

Dated at Detroit, Michigan, this 30th day of April, 1943.

FRANK H. BOWEN,
Regional Director,
National Labor Relations Board,
Seventh Region.

RESPONDENT'S LETTER REQUESTING ORAL ARGUMENT

(COPY)

May 19, 1943

National Labor Relations Board
Washington, D. C.

Attention: Chief Trial Examiner

Re: Federal Motor Truck Company
Case No. VII-R-1409

Gentlemen:

In accord with your rules, and as counsel for the employer, we enclose herewith the original and three copies of the brief of the Federal Motor Truck Company.

You will note that in the conclusion of the brief we are asking for an oral argument. We appreciate that in representation cases the Board does not favor the granting of such a request, but we feel that the questions here involved are of such importance, especially in the Detroit area, that we should be given an opportunity to orally present the matter to the Board. There are a great many of these cases. Most of them are being opposed by man-

agement. A decision of the Board after an oral argument and thorough consideration would be most helpful.

A copy of the brief is today being served upon counsel for the union.

Very truly yours,

(s) ALBERT E. MEDER.

LETTER DENYING RESPONDENT'S REQUEST FOR ORAL ARGUMENT

June 2, 1943

Albert E. Meder, Esquire
Messrs. Beaumont, Smith & Harris
Eleventh Floor Ford Building
Detroit, Michigan.

Re: Federal Motor Truck Company
Case No. R-5356

Dear Sir:

With further reference to your communication of May 19, 1943, please be advised that the Board has considered and denied your request for oral argument in the above matter.

Very truly yours,

JOHN E. LAWYER,
Chief, Order Section.

JL/ep

TRIAL EXAMINERS' STATEMENT IN "R" CASES
Board's Exhibit No. 3

In relation to the Board's investigation concerning the selection of representatives for the purposes of collective bargaining in this case, it is desired at the outset to make clear the position of the trial examiner. The sole objective of the trial examiner here is to obtain a full and complete factual record upon which the Board itself may discharge its duties under Section 9 of the National Labor Relations Act.

It is the duty of the trial examiner to see that the record is full enough to contain all the material evidence but to limit the testimony and refuse to permit the inroduction of evidence which is not material and relevant. His discretion is limited by this duty with which he is charged. Your attention should also be called to the fact that, in this type of case, as distinguished from a case where the employer is charged with the commission of unfair labor practices in violation of the Act, the trial examiner does not render an intermediate report to the parties. The case goes directly to the Board for decision.

In general, the trial examiner will present evidence bearing upon the question of the Board's jurisdiction over the parties and the subject matter of the investigation, while the representatives of the other parties will be expected (with the assistance of the trial examiner if necessary) to present evidence upon the remaining issues. These issues include a description of the labor organizations involved, facts relating to the question concerning representation which is alleged to have arisen, the limits of the appropriate unit for collective bargaining, and the eligibility of employees for voting in any election which may be ordered. The services of the trial examiner are equally at the disposal of all parties to the proceeding in developing such material evidence.

More specifically the evidence should disclose, as to the labor organizations involved, their identity, time of formation, and general structure, including data as to eligibility of members, with particular reference to the employer here

concerned. The nature of the question concerning representation should be shown by proof as to whether conflicting claims as to representation are being made, or whether the employer questions the representative status of any of the parties. Likewise the time when organization began, the department or group of employees affected, the subsequent growth or decline of membership, present claims as to membership, and relations had with the employer, including requests for collective bargaining and the presence or absence of contracts, are all of importance.

In considering the appropriate unit for purposes of collective bargaining, the proof should reveal the physical properties involved, a break-down of the nature of work performed by employees as well as an analysis of the numbers of employees engaged in each type of work. The presence or absence of craft organizations should be established, as well as evidence submitted on the identity or differentiation of employees' problems as to wages, hours, or working conditions. The history of bargaining units in the plant or in the industry should be disclosed. Information is also desired as to the date as of which the payroll of eligible voters should be taken, for purposes of election or certification.

These suggestions are of necessity not all-inclusive. They may, however, serve to guide the parties to a full and complete factual presentation in which the trial examiner will, in an entirely neutral capacity, assist. The cooperation of all in order to get these facts as expeditiously as possible is required.

DECISION AND DIRECTION OF ELECTION
Board's Exhibit No. 3-A

(Signed June 8, 1943)

Beaumont, Smith and Harris, by *Mr. Albert E. Meder,* of Detroit, Mich., for the Company.

Maurice Sugar and N. L. Smokler, by *Messrs. N. L. Smokler* and *Irving E. Griffeth,* both of Detroit, Mich., for the Union.

Mr. David V. Easton, of counsel to the Board.

Statement of the Case

Upon petition duly filed by Amalgamated Plant Protection Local Union No. 114, UAW-CIO, herein called the Union, alleging that a question affecting commerce had arisen concerning the representation of the employees of Federal Motor Truck Company, Detroit, Michigan, herein called the Company, the National Labor Relations Board provided for an appropriate hearing upon due notice before Robert J. Wiener, Trial Examiner. Said hearing was held at Detroit, Michigan, on May 14, 1943. The Company and the Union appeared, participated, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. The Trial Examiner's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Company and the Union each filed briefs which have been considered by the Board.

Upon the entire record in the case, the Board makes the following:

Findings of Fact

I. The business of the Company

Federal Motor Truck Company, a Michigan corporation, is normally engaged in the production of motor trucks, bodies, cabs, and parts. At the present time the Company is wholly engaged in the manufacture of trucks and truck parts for the United States Army. For these purposes the Company operates three plants, all of which are located in Detroit, Michigan, and with which we are concerned herein. In the calendar year 1942 the Company purchased raw materials from points located outside the

State of Michigan valued at approximately $10,400,000. During the same period the Company made deliveries of finished products to points outside the State of Michigan totaling approximately $25,000,000. We find that the Company is engaged in commerce within the meaning of the National Labor Relations Act.

II. The organization involved

Amalgamated Plant Protection Local Union No. 114 is a labor organization chartered by International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, herein called the International, affiliated with the Congress of Industrial Organizations, admitting to membership employees of the Company.

III. The question concerning representation

On March 29, 1943, the Union requested the Company, by letter, that it be recognized as the exclusive bargaining represenative of the Company's plant-protection employees. The Company refused to comply with this request. Thereafter, on April 5, 1943, the Union filed the petition in this proceeding.

The Company is currently operating under a collective bargaining agreement with the International and its Local 174, which covers all factory employees of the Company with the exception of certain specified classifications, among which are plant-protection employees. This agreement contains the provision that "the Union will not solicit or accept . . . for membership" those employees who were excluded from the purview of this agreement. The Company contends that the Union is bound by this provision, and is therefore estopped from seeking to represent the plant-protection employees.

A similar argument has been heretofore found untenable in a number of cases.[1] In the *Packard* case, we stated:

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[1] *Matter of Briggs Manufacturing Company* and *Amalgamated Plant Protection Local Union No. 114 (UAW-CIO)*, 49 N.L.R.B., No. 10; *Matter of Packard Motor Car Company* and *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO)*, 47 N.L.R.B., No. 117.

> The issue becomes . . . whether employees may be denied the privilege of selecting a particular labor organization as their representative because that organization has agreed, in a contract with their employer, not to represent them. In our opinion, such a contractual provision contravenes the express purpose and policy of the Act.

Accordingly, we reject this argument of the Company and find that the afore-mentioned contract does not preclude the Union from seeking to represent the plant-protection employees.

A statement of the Regional Director, introduced into evidence at the hearing, indicates that the Union represents a substantial number of employees in the unit hereinafter found appropriate.[2]

We find that a question affecting commerce has arisen concerning the representation of employees of the Company within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

IV. The appropriate unit

The Union contends that all plant-protection employees, excluding the plant engineer, the assistant chief of plant protection, and supervisors, constitute an appropriate unit. The Company contends that such a unit is not one that is appropriate within the meaning of the Act. This contention is based upon the following arguments: (a) plant-protection employees are part of the supervisory and management group; (b) they are auxiliaries of the military police, and therefore are not employees within the meaning of the Act; and (c) it is contrary to public policy to include plant-protection employees.[3] The Company con-

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[2] The Regional Director reported that the Union submitted 15 authorization cards bearing apparently genuine original signatures and names appearing upon the Company's pay roll which was submitted on April 26, 1943. This pay roll contains the names of 18 persons in the appropriate unit.

[3] In addition, the Company argues that the contract provision referred to above precludes finding that plant-protection employees constitute an appropriate unit.

cedes that, if these arguments are found to be invalid, then the unit sought by the Union would be appropriate.

The Company argues that in normal times the duties of the plant-protection employees are such that these employees are part of the managerial and supervisory arm of the Company. The record discloses that prior to August 1942, they were known as watchmen and firemen, but since that date they have been termed plant-protection employees. They were and are now vested with those duties and powers customarily given to employees concerned with the physical care of the premises. The Company asserts that in times of industrial strife these employees must necessarily be aligned with management because of their duties, and therefore they are more appropriately akin to management than to the regular production employees. While their duties are of a special nature, it is clear that plant-protection employees are clothed with no supervisory authority over their fellow employees. We find nothing in their duties which impels the conclusion that their relationship to management is so close that they cannot be represented in a separate unit for collective bargaining.

Now that the plant-protection employees have become militarized, the Company contends that their duties and obligations, not only to the Company but also to the United States Government, are such as to require finding that they are no longer "employees." It points to the fact that they are now subject to military rather than civil jurisdiction; that they now have the power to arrest; that they are required to receive special instructions given by the United States Army, and that their duties have become more stringent. The Company further asserts that they have the power to recommend discharges. However, their arms, pay, uniforms, and conditions of employment are still under the control of the Company. The Company controls hiring and dismissal, subject to some supervision by the military authorities. A bulletin issued by the Army authorities with regard to the regulations of military police recites that "basically, the militarization of plant guard forces does not change the existing systems

of hiring, compensation, and dismissal; all remain primarily a matter between the guards and the plant management." The alleged power to recommend discharge is not the customary authority exercised by foremen or other supervisory employees. While discharge may result from a report of a plant guard, it flows from the facts reported by him rather than from the exercise of any discretionary authority vested in him. We accordingly reject the argument that plant-protection employees are no longer employees within the meaning of the Act.[4]

We find that all plant-protection employees of the Company engaged at its three Detroit plants, excluding the plant engineer, the assistant chief of plant protection, and all supervisory employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

V. The determination of representatives

We shall direct that the question concerning representation which has arisen be resolved by an election by secret ballot among the employees in the appropriate unit who were employed during the pay-roll period immediately preceding the date of our Direction of Election, subject to the limitations and additions set forth therein.

DIRECTION OF ELECTION

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 9, of National Labor Relations Board Rules and Regulations—Series 2, as amended, it is hereby

DIRECTED that, as part of the investigation to ascertain representatives for the purposes of collective bargaining with Federal Motor Truck Company, Detroit, Michigan, an election by secret ballot shall be conducted as early as possible, but not later than thirty (30) days from the date

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[4] *Matter of Jones & Laughlin Steel Company, Otis Works and United Steelworkers of America (C.I.O.)*, 49 N.L.R.B., No. 50, and cases cited therein.

of this Direction, under the direction and supervision of the Regional Director for the Seventh Region, acting in this matter as agent for the National Labor Relations Board, and subject to Article III, Section 10, of said Rules and Regulations, among the employees in the unit found appropriate in Section IV, above, who were employed during the pay-roll period immediately preceding the date of this Direction, including employees who did not work during said payroll period because they were ill or on vacation or temporarily laid off, and including employees in the armed forces of the United States who present themselves in person at the polls, but excluding any who have since quit or been discharged for cause, to determine whether or not they desire to be represented by Amalgamated Plant Protection Local Union No. 114, affiliated with International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations, for the purposes of collective bargaining.

Signed at Washington, D. C., this 8th day of June, 1943.

HARRY A. MILLIS, *Chairman,*
JOHN M. HOUSTON, *Member,*
National Labor Relations Board.

(SEAL)

REPORT ON ORDERED ELECTION

(Docketed July 10, 1943)

Pursuant to the Rules and Regulations of the National Labor Relations Board (herein called the Board), the undersigned hereby reports that the election heretofore directed by the Board in the above-entitled case was conducted in accordance with the notice of election attached hereto and with the following results:

Approximate number of eligible voters 18

Counts of Ballots:

Total ballots cast	17
Total ballots challenged	0
Total void ballots	1
Total valid votes counted	16
Votes cast for A.P.P.L.U.No. 114, affiliated with I.U., U.A.A. and A.I.W.A., CIO	15
Votes cast against A.P.P.L.U. No. 114, affiliated with I.U., U.A.A. and A.I.W.A., CIO	1

The counting and tabulating were fairly and accurately done. Statements to such effect from the observers to the election are on file.

The undersigned find that Amalgamated Plant Protection Local Union No. 114, affiliated with International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO (has) been designated and selected by a majority of the employees in the bargaining unit found by the Board in its Decision in this proceeding to be appropriate and recommends that the Board (so certify).

Dated at Detroit, Michigan, this 6th day of July, 1943.

(s) FRANK H. BOWEN,
Regional Director,
National Labor Relations Board.

CERTIFICATION OF REPRESENTATIVES

Board's Exhibit No. 3-B

(Signed July 16, 1943)

On July 3, 1943, pursuant to the Decision and Direction of Election issued by the Board herein on June 8, 1943,[1] an election by secret ballot was conducted under the direction and supervision of the Regional Director for the Seventh Region (Detroit, Michigan). Thereafter, on July 6, 1943, in accordance with the Rules and Regulations of the Board, a Report on Ordered Election was issued and served upon the parties. No objections to the said report, or to the conduct of the ballot, have been filed by any of the parties. The report shows as follows:

Approximate number of eligible voters	18
Total ballots cast	17
Total ballots challenged	0
Total void ballots	1
Total valid votes counted	16
Votes cast for A.P.P.L.U. No. 114, affiliated with I.U., U.A.A. and A.I.W.A., CIO	15
Votes cast against A.P.P.L.U. No. 114, affiliated with I.U., U.A.A. and A.I.W.A., CIO	1

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9, (c) of the National Labor Relations Act, and pursuant to Article III, Sections 9 and 10, of National Labor Relations Board Rules and Regulations—Series 2, as amended,

IT IS HEREBY CERTIFIED that Amalgamated Plant Protection Local Union No. 114, affiliated with International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, has been designated and selected by a majority of all plant-protection employees of Federal Motor Truck Company engaged at its three Detroit, Michigan, plants, excluding the plant engineer, the assistant chief of plant protection, and all supervisory employees, as their representative for the purposes of collective bargaining, and that, pursuant to Section 9 (a)

[1] 50 N.L.R.B., No. 36.

of the Act, the said organization is the exclusive representative of all such employees for the purposes of collective bargaining with respect to rates of pay, wages, hours or employment, and other conditions of employment.

Signed at Washington, D. C., this 16th day of July, 1943.

HARRY A. MILLIS, *Chairman*,
JOHN M. HOUSTON, *Member*.
National Labor Relations Board.

(SEAL)

TRANSCRIPT OF TESTIMONY

(Docketed May 20, 1943)

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

SEVENTH REGION

1*

In the matter of

FEDERAL MOTOR TRUCK COMPANY

and

AMALGAMATED PLANT PROTECTION LOCAL UNION No. 114, UAW-CIO

Case No. VII-R-1409

1332 National Bank Building
Detroit, Michigan
Friday, May 14, 1943.

Pursuant to Notice, the above-entitled matter came on for hearing at 10:00 A. M.

Before: ROBERT J. WIENER, Trial Examiner.

APPEARANCES:

Beaumont, Smith and Harris, by *Albert E. Meder, Esq.*, 11th Floor Ford Building, Detroit, Michigan, for the Company.

Maurice Sugar and N. L. Smokler, by *N. L. Smokler, Esq.*, 3220 Barlum Tower, Detroit, Michigan, and

Irving E. Griffeth, Esq., 907 Hofmann Building, Detroit, Michigan, for the Petitioner.

2 (Original Index)

* Inset numbers appearing at outer edge of text indicate page numbers of original stenographic transcript of testimony.

PROCEEDINGS

3 Trial Examiner Wiener: The hearing will be in order.

Mr. Meder: Now let it be understood I am not urging to go ahead without Mr. Smokler.

Trial Examiner Wiener: Well, do you want to adjourn until he gets here, Mr. Meder?

Mr. Meder: May we go off the record?

Trial Examiner Wiener: Off the record.

(Discussion off the record).

Trial Examiner Wiener: On the record.

We will take a fifteen-minute adjournment in the hope that Petitioner's counsel will appear by that time.

(A short recess was taken).

Trial Examiner Wiener: On the record.

This is a formal hearing in the matter of Federal Motor Truck Company, and Amalgamated Plant Protection Local Union No. 114, UAW-CIO, the case being Number 7-R-1409, before the National Labor Relations Board.

Counsel will please state all appearances for the record. The Trial Examiner appearing for the National Labor Relations Board is Robert J. Wiener.

Mr. Smokler: Maurice Sugar and N. L. Smokler, by N. L. Smokler, 3220 Barlum Tower, Detroit, Michigan.

Mr. Griffeth: Irving E. Griffeth, 907 Hofmann Building, representing UAW-CIO, No. 114.

Mr. Meder: Beaumont, Smith, and Harris, by Albert E. Meder for the Company, 11th Floor of the Ford

4 Building, Detroit.

Trial Examiner Wiener: You gentlemen have all heard this opening statement a number of times, and may we dispense with the reading of it?

Mr. Smokler: You can as far as the Petitioner is concerned.

Mr. Meder: Yes, sir.

Trial Examiner Wiener: I ask the reporter to mark as Board's Exhibit 1, a collective exhibit consisting of the Petition for Certification, and the Notice of Hearing; as Board's Exhibit 2, Affidavit as to Service of notice of

hearing; as Board's Exhibit 3, the Trial Examiner's statement in "R" cases, and as Board's Exhibit 4, Statement of Regional Director Concerning Claims of Authorization for the Purpose of Representation.

(The documents referred to were marked for identification, Board's Exhibits 1, 2, 3, and 4).

Mr. Meder: The Company will have no objection to Exhibits 1, 2, and 3. As to Exhibit 4, we object to it for the reason it is hearsay, not competent proof.

Trial Examiner Wiener: Mr. Smokler, have you any objection to Board's Exhibits 1 through 4?

Mr. Smokler: No, I have no objections.

Trial Examiner Wiener: Noting the objection of the Company to Board's Exhibit 4, I will admit Board's
5 Exhibits 1, 2, 3, and 4.

(The documents heretofore marked for identification as Board's Exhibits 1, 2, 3, and 4, were received in evidence).

Trial Examiner Wiener: Mr. Smokler, do you want to join in the Commerce stipulation, or do you want that between the Company and the Board?

Mr. Smokler: Either way.

Trial Examiner Wiener: It is stipulated by and between the parties to this proceeding that the Federal Motor Truck Company is incorporated in the State of Michigan. In peacetime, its business consisted of the production of motor trucks, bodies, cabs, and parts. The Company is now wholly engaged in the manufacture of trucks and truck parts for the United States Army.

In the calendar year, 1942, the Company purchased raw materials which originated at points outside the State of Michigan in the value of approximately ten million four hundred thousand dollars, and its total purchases of raw materials was in excess of that amount.

During the calendar year, 1942, the Company made deliveries of finished products to points in states other than the State of Michigan, totaling approximately twenty-five million dollars, and its total shipments of all furnished

products during the year 1942, was in excess of that amount.

6 The principal raw materials used by the Company in the manufacture of its products are wood, steel, lumber, tires, and parts.

Does Petitioner so stipulate?

Mr. Smokler: The Petitioner so stipulates.

Trial Examiner Wiener: Does the Company so stipulate?

Mr. Meder: Yes.

Trial Examiner Wiener: The Board so stipulates.

It is stipulated by and between the parties to this proceeding that Amalgamated Plant Protection Local Union Number 114, UAW-CIO, the Petitioner herein, was chartered by International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America (UAW-CIO), an affiliate of the Congress of Industrial Organizations, on June 24, 1942, and that it is a labor organization within the meaning of the National Labor Relations Act.

Does the Petitioner so stipulate?

Mr. Smokler: Petitioner so stipulates.

Trial Examiner Wiener: Does the Company so stipulate?

Mr. Meder: Yes, sir.

Trial Examiner Wiener: It is stipulated by and between the parties to this proceeding, that a question concerning representation has arisen in that on March 29, 1943, a letter was transmitted by Petitioner to the Company, in which Petitioner requested that it be recognized as bargaining agent for certain of the Company's

7 Plant Protection employees, and in that, the Company has not complied with the request.

Does Petitioner so stipulate?

Mr. Smokler: Petitioner so stipulates.

Trial Examiner Wiener: The Company?

Mr. Meder: Yes.

Trial Examiner Wiener: Before reading a stipulation with respect to the question of the appropriateness of the alleged unit in this matter, Company counsel has asked an opportunity to state the Company's position with respect to the matter.

Mr. Smokler: Before we proceed wih that, Mr. Examiner, do you desire that the letter which was sent to the Company be introduced in evidence?

Trial Examiner Wiener: You may introduce it. It makes no difference to me.

Mr. Smokler: If it is not necessary, I won't introduce it.

Trial Examiner Wiener: It is not necessary in view of the situation.

Mr. Meder: The position of the Federal Motor Truck Company is, in the first place, that the Plant Protection men are a part of the supervision, part of management. Therefore, the Company should not be required under the Act to recognize the bargaining agency for them; that the men here involved are militarized Plant Protection men, and as such, in this case, are not employees within the meaning of the Act; that it would be contrary to
8 public policy to include militarized Plant Protection men such as these men, within the Act; that it is not within the legal discretion of the Board to issue any certification of the facts of this case; that it is inconsistent with the prosecution of the war effort and the war itself to certify this Union, or any other union, as the bargaining agency of Plant Protection men.

Without waiving any of the positions we have thus far taken, the Company takes the further position that even if these Plant Protection men are employees within the Act, the International Union, of which Local 114 is a part, is under written contract with the Company, in which contract the International agrees that it will not accept for membership, or represent, Plant Protection men.

The Company further takes the position that it will not effectuate the policies of the Act to grant representation in this case.

The Company further takes the position that the proposed unit here is not an appropriate unit, not an appropriate bargaining unit.

Furthermore, the Company denies that there is a question affecting commerce involved.

Now as far as our position to the effect that the unit here is not an appropriate bargaining unit, let me say

that if it should be held that we are wrong on all our contentions, then I will admit that the unit here is
9 the kind of unit that would be appropriate for collective bargaining.

Trial Examiner Wiener: May we stipulate, gentlemen, that if each and every one of the Company's contentions is overruled by the Board, that then the Board may properly find to be appropriate a unit consisting of the Plant Protection employees of this Company at its Federal Avenue Plant, Detroit, Michigan, Number Two Plant at Michigan and Hubbard Avenues, Detroit, Michigan, and two floors at 574 East Woodbridge Street, Detroit, Michigan, as a single unit, excluding, however, the plant engineer and the assistant chief of plant protection?

Mr. Meder: Yes, on behalf of the Company. That is what I meant by the latter part of my statement of a few moments ago.

Trial Examiner Wiener: Does the Petitioner so stipulate?

Mr. Smokler: Yes. Without, of course, admitting any validity to any contentions raised by the Company. More specifically, denying that the questions raised by the Company have any bearings on these proceedings.

Trial Examiner Wiener: Do you care, at this point, Mr. Smokler, to make a similar catalog of your contentions?

Mr. Smokler: May we have just a moment, Mr. Examiner?

Trial Examiner Wiener: We will be off the record.

(Discussion off the record).

Trial Examiner Wiener: On the record.

Mr. Smokler, have you any witnesses you want to present at this time?

10 Mr. Smokler: You asked me, not to answer your question directly, whether I had any statement to make in answer to Mr. Meder's.

Trial Examiner Wiener: That is correct. Excuse me. You have an opportunity to make such a statement.

Mr. Smokler: The only statement I care to make at this time is, all the contentions raised by counsel have been

adjudicated by the Board, and found by the Board to be without merit. Probably depending upon the evidence, of course, I might or might not elaborate on that statement.

Trial Examiner Wiener: Well, you will have an additional opportunity at the close of the hearing, Mr. Smokler, to make any brief statement; so will Mr. Meder.

Mr. Smokler: The Petitioner has no further testimony at this time. However, I wonder whether or not there should be some testimony in the record with respect to the single unit. I note that the Company has several plants or parts of plants. I wonder if it might be advisable to introduce some testimony.

Trial Examiner Wiener: Do you care to call a witness and question him?

Mr. Meder: May we go off the record a moment?

Trial Examiner Wiener: Off the record.

(Discussion off the record).

Trial Examiner Wiener: On the record.

Mr. Smokler: The Petitioner rests.

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11 **FORBES W. LUTTON,**

a witness called by and on behalf of the Company, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Meder): Your name is Forbes W. Lutton?

A. Yes, sir.

Q. You are plant engineer at the Federal Motor Truck Company, Detroit?

A. Yes, sir.

Q. As plant engineer, you are in charge of the watchmen?

A. Yes, sir.

Q. The Company now has three plants, has it not?

A. Yes, sir.

Q. One of them is the main plant located on Federal Avenue?

A. Yes.

Q. Then you have a plant at Michigan and Hubbard called No. 2 Plant?

A. Yes, sir.

Q. There you have one watchman on each of three shifts, is that correct?

A. That is right.

Q. Then you occupy two floors down at 574 East Woodbridge?

A. Yes.

Q. And you have two watchmen on one shift there?

A. That is right.

12 Q. All three of these plants are in Detroit?

A. That is right.

Trial Examiner Wiener: The balance of the 18 watchmen referred to in Board's Exhibit 4 are employed at the Federal Avenue Plant, are they?

The Witness: That is right.

Q. (By Mr. Meder): But you have 660 employees in the unit out there, for which Local 174 of the International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America, bargain? Is that correct?

A. Yes, sir.

Mr. Meder: Mark this, please.

(The document referred to was marked for identification as Company's Exhibit 1).

Mr. Meder: The Company offers in evidence the Constitution of the International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America, UAW-CIO, dated August, 1942, which is the present constitution, as I understand it, of the International Union. Is that correct?

Mr. Smokler: That is correct.

Mr. Meder: We offer it in evidence.

Mr. Smokler: Petitioner has no objection.

Trial Examiner Wiener: Without objection the exhibit will be received.

(The document heretofore marked for identification as Company's Exhibit 1 was received in evidence).

Mr. Meder: Mark this, please..

(The document referred to was marked for identification as Company's Exhibit 2).

Mr. Meder: Company also offers in evidence Company's Exhibit 2, the application card used by the International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America, UAW-CIO, in the organization of the watchmen involved in this case. I understand that is agreed to.

Mr. Smokler: I offer no objection to the constitution, because I assumed that Mr. Meder was going to tie it up later on.

Mr. Meder: Oh, yes.

Mr. Smokler (Continuing): In connection with the contentions that you stated on the record earlier in the proceedings?

Mr. Meder: That is right.

Mr. Smokler: And with that reservation, I have no objection.

Trial Examiner Wiener: Company's Exhibit 2 will be received.

(The document heretofore marked for identification as Company's Exhibit 2 was received in evidence).

Mr. Meder: Mark this, please.

(The document referred to was marked for identification as Company's Exhibit 3).

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Q. (By Mr. Meder): I show you a paper which has been marked for identification, Company's Exhibit 3, and ask you whether that is an agreement that is now in force between the Company and the International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America, and its Local 174, covering the 660 employees whom we referred to a few moments ago?

A. Yes, it is.

Mr. Meder: I offer this exhibit in evidence, especially because of the contents of Section 2 of Article I.

Mr. Smokler: I don't see the materiality of Company's proposed Exhibit No. 3; therefore, object to its introduction in evidence.

Trial Examiner Wiener: It seems to me to be connected with at least one of the contentions that the Company has already made in this proceeding, and I will admit it.

(The document heretofore marked for identification as Company's Exhibit 3, was received in evidence).

Mr. Meder: Mark this, please.

(The document referred to was marked for identification as Company's Exhibit 4).

Q. (By Mr. Meder): I show you now, Witness, paper which for the purpose of identification has been marked C-4, Company's Exhibit 4, and ask you if you have seen that before.

15 A. Yes, sir.

Q. That is a memorandum, is it not, dated August 7, 1942, from the headquarters of the Sixth Service Command, Internal Security Division, Plant Protection Branch, Quartermaster Section, signed by Charles S. Stewart, Major, is that correct?

A. Yes, sir, correct.

Q. These watchmen, whom you have now are militarized, are they not?

A. They are.

Q. State whether or not this Company's Exhibit 4 was one of the reasons that lead up to the militarizing of these watchmen.

A. It is.

Mr. Meder: I offer in evidence Company's Exhibit 4.

Mr. Smokler: Have you an extra copy of your proposed Exhibit No. 4?

Mr. Meder: No, but I will see that you get one.

Mr. Smokler: Mr. Examiner, I would like to inquire at

this time of Mr. Meder what purpose he has in mind in offering Company's Exhibit No. 4.

Mr. Meder: Why these people are militarized police, why they became militarized, fitting in with one of my defenses, what led up to their being militarized. In other words, the question of the Army.

Mr. Smokler: I would like to be heard on that, Mr. Examiner but I am waiting until after you have finished reading the exhibit.

16 Trial Examiner Wiener: All right, Mr. Smokler, go ahead.

Mr. Smokler: The reasons which Mr. Meder stated in support of the materiality of Company's Exhibit Number 4 are not with any merit, because the Board has already adjudicated that entire issue, and has found that Plant Protection employees are employees within the meaning of the Act in a number of decisions. I therefore object to the introduction in evidence of Company's Exhibit No. 4, as not being material to the issues in this case.

Mr. Meder: That is a strange objection in a case in which we are contesting the very issue about which counsel speaks.

Trial Examiner Wiener: If I understood your statement, Mr. Meder, your purpose in introducing Company's Exhibit 4 for identification, was to establish the fact that at the request of army authority, the employees in the unit here alleged to be appropriate, are auxiliaries to the military police, is that correct?

Mr. Meder: That is correct.

Trial Examiner Wiener: Can't we stipulate that, Mr. Smokler?

Mr. Smokler: Yes.

Trial Examiner Wiener: It is stipulated by and between the parties to this proceeding that the employees in the unit alleged by Petitioner to be appropriate are, all of them, auxiliaries of the military police.

17 Mr. Meder: That situation is brought about as a result of a communication received by the Company, dated August 7, 1942, and a further communication dated August the 8th, 1942.

Mr. Smokler: You are adding something on to the stipulation proposed by the Examiner?

Mr. Meder: That is right, sir.

Mr. Smokler: Well, I think the stipulation proposed by the Examiner is concise, and covers the subject.

Mr. Meder: Well, I desire to introduce Company's Exhibit 4 in evidence. I see no reason why I shouldn't.

Trial Examiner Wiener: In the absence of Petitioner agreeing to the stipulation as you have worded it?

Mr. Meder: No, even with the stipulation worded as you have worded it, and as I have tried to amend it, I still think we are entitled to have this letter of August 7 placed in the record, and I ask to have it placed in the record.

Trial Examiner Wiener: Well, in order to shorten the record, and particularly since, if Company's Exhibit 4 is not material, I see nothing in it prejudicial to Petitioner, I will receive it.

(The document heretofore marked for identification as Company's Exhibit 4, was received in evidence).

Mr. Meder: Will you mark this, please?

(The document referred to was marked for
18 identification as Company's Exhibit 5).

Q. (By Mr. Meder): I show you, witness, what has been marked for identification as Company's Exhibit 5, and ask you if you have seen that before.

A. Yes, sir.

Q. That is a photostatic copy, is it not, of a letter dated August 8, 1942, from headquarters of the Sixth Service Command, signed by Major Stewart. Right?

A. That is right.

Q. And is that another one of the letters which lead up to the militarizing of your Plant Protection men?

A. It is.

Mr. Meder: I offer in evidence Company's Exhibit 5.

Q. (By Mr. Meder): When you received that, was the second page attached?

A. Yes, sir, it was.

Q. It was the form of the agreement that was used?

A. Yes, it is.

Mr. Meder: In offering Company's Exhibit 5, let it be understood that I offer both pages.

Trial Examiner Wiener: Mr. Meder, while Mr. Smokler is examining Company's Exhibit 5, I want to ask you a question with reference to Company's Exhibit 3 in evidence. I notice that the contract was entered into as of April First, 1942, that while it is of indefinite dura-
19 tion, it does provide for termination at the expiration of the first annual period. Therefore, I ask you whether this contract, Company's Exhibit 3, is at present in effect?

Mr. Meder: I will ask the witness that.

Q. (By Mr. Meder): Is the contract at present in effect?

A. Still is, yes.

Q. You are negotiating now for a new contract, are you not?

A. Yes.

Q. But that contract is still in effect?

A. Still in effect.

Mr. Meder: I offer in evidence, Your Honor, Please, Company's Exhibit 5, both pages.

Mr. Smokler: I will make the same objection that I did to Company's proposed Exhibit No. 4.

Trial Examiner Wiener: Do you have any question with respect to the authenticity of the exhibit, Mr. Smokler?

Mr. Smokler: Well, it appears to be the same as has been introduced in other cases, and it appears, or purports, at least, to be the customary letter that was sent to the Company, to Plant Protection employees, and the oath attached purports and appears to be the same oath that has been sent to other companies. We don't question the authenticity of the exhibit. We do question its materiality.

Trial Examiner Wiener: For the reasons I gave with respect to Company's Exhibit 4, I will receive Company's Exhibit Five.

(The document heretofore marked for identification as Company's Exhibit 5, was received in evidence).

Q. (By Mr. Meder): Witness, as a result of the request of the army, state whether or not, beginning on August 19, 1942, the army started to swear in your Plant Protection men as auxiliary military police.

A. They did.

Q. Are they all sworn in as of today with the exception of one?

A. That is right.

Q. And that man is being sworn in Saturday, is that right?

A. Saturday.

Q. Of this week. And the reason he isn't sworn in is the fact he is a new employee?

A. New employee.

Q. Now when these men were sworn in, state whether or not the army caused them to sign an agreement such as is contained on Page 2 of Company's Exhibit 5.

A. Yes, they did.

Q. And Major Charles S. Stewart of the Sixth Service, carried on that work, did he not?

A. Yes, he did.

Q. State whether or not the Articles of War were read to these men.

A. They were.

Q. By the Major, or at least portions of them?

A. Yes.

Q. Were you required to place a bulletin on the bulletin board furnished by the army?

A. Yes.

Q. Have you got a copy of that?

A. Yes, I have.

Mr. Meder: Mark this, please.

(The document referred to was marked for identification as Company's Exhibit 6).

Q. (By Mr. Meder): I show you, Witness, a photostatic copy of the paper which has been marked Company's Exhibit 6, and ask you if that is the bulletin to which you referred a few minutes ago.

A. Yes.

Q. Was that bulletin posted by the Company?

A. Yes, it was.

Q. Is it still so posted?

A. Still so posted.

Q. Where have you got it posted?

A. Posted on the bulletin board in the room that the guard force uses as a meeting room.

Mr. Meder: Company offers in evidence Company
22 Exhibit 6.

Trial Examiner Wiener: Have you any objection to Company's Exhibit 6?

Mr. Smokler: I have the same objection to Company's Exhibit 6 that I had to Company's Exhibits 4 and 5.

Trial Examiner Wiener: I want to make clear, if it isn't already, that in admitting these Exhibits 4, 5, and 6, I am not ruling on their materiality. They are relevant to the issues, and the Board may decide to give them whatever weight it chooses. I accept and receive Company's Exhibit 6.

(The document heretofore marked for identification as Company's Exhibit 6 was received in evidence).

Q. (By Mr. Meder): Now then, following August 19, 1942, was military training given by the army to these Plant Protection men?

A. Yes.

Mr. Smokler: Mr. Examiner, may I have an objection to this whole line of questioning on the basis that it is immaterial to the determination of the issues in this case? I presume you are going to show that the plant guards are a part of the military and auxiliary police force?

Mr. Meder: Yes.

Mr. Smokler: I want to object to this entire line of questioning.

Trial Examiner Wiener: Off the record.

(Discussion off the record.)

23 Trial Examiner Wiener: On the record.

Mr. Smokler: I offer another objection to this line of questioning, since I indicated earlier that the Petitioner was willing to stipulate that the Plant Protection—plant guards, are auxiliaries to the military police.

Trial Examiner Wiener: Would you indicate in the face of Petitioner's objection, Mr. Meder, what your objective in proof is?

Mr. Meder: I want to build a record here to show what the difference is between the way in which these men operate now and the way they operated prior to the time that they were made military police.

Trial Examiner Wiener: And while you were off the record you indicated your proofs would be brief?

Mr. Meder: That is correct.

Trial Examiner Wiener: I will overrule the objection, then, to permit the answer; however, reserving the Petitioner's counsel the right to object specifically to any particular question which you may ask, Mr. Meder.

Mr. Smokler: I take it, Mr. Examiner, that I have an objection to this entire line of questioning?

Trial Examiner Wiener: It has been noted, and you are familiar with the practice which permits an automatic exception to adverse rulings.

Q. (By Mr. Meder: In giving this military train-
24 ing, they have given training in sighting and shooting, have they not?

A. They are doing that now.

Q. Doing that now. As a matter of fact, you sent Assistant Chief Richards over to Chicago, did you not, to attend a military training instructor's school carried on by the army?

A. That is right.

Q. He was over there a week, was he not?

A. He was.

Q. These men are all required now to wear arm emblems designating the fact that they are auxiliary police, and they do so wear them, do they not?

A. They do.

Q. They have the right now to carry guns, is that correct?

T. They have.

Q. They didn't carry guns before, did they?

A. No.

Q. You are getting guns for them as rapidly as you can purchase them, is that correct?

A. That is right.

Q. They are uniformed?

A. Yes, sir.

Q. They had been uniformed, though, had they not, ever since the war had started, or shortly after the war had started?

A. Shortly after the war had started.

Q. They are required by the army to carry cards, are they not?

A. Yes.

Q. Which identify them?

A. Yes, sir.

Q. Those cards carry the authentication of the QMC, don't they, quartermasters?

A. Yes, sir.

Q. What grade or authority, and what is the difference between the duties of these men now, and the duties of these men prior to the war, prior to their being sworn in as auxiliary military police? Take the matter of arrests, for instance, do you know whether they now have the right of arrest?

A. They have the right to arrest now, which they didn't have before.

Q. Have they the right to carry firearms?

A. Yes.

Q. Are they subject to military rather than civil trial?

A. They are.

Q. Subject to court martial?

A. Yes, sir.

Q. They are required now to identify all workmen and any others who come in and out of the plant, are they not?

A. Yes.

Q. And those persons have to identify themselves, do they not?

A. They do.

Q. And that is true, is it not, as well, of any
26 automobiles or any trucks?

A. Yes.

Q. That come in or out of your plants?

A. Yes.

Q. They are also required, are they not, to examine parcels and lunch boxes of employees as they come in, and as they leave the plant?

A. Yes, sir.

Q. That was not formerly true, was it?

A. No.

Q. They escort, do they not, all railroad cars as they come into the yards of the plant?

A. To some extent, they do.

Q. To what extent do they?

A. They do at the main entrance to the plant.

Q. Main entrance to the plant. And are they pledged to obey all military rules and regulations?

A. Yes.

Q. They are required to take this training you talked about?

A. Yes, sir.

Q. As a matter of fact, aren't they given training every Saturday now?

A. Every Saturday, yes.

Q. The uniforms are now compulsory?

A. Yes, sir.

27 Q. They were not heretofore, is that correct?

A. That is right.

Q. What do you know about this deferment?

A. Well, as I understand it, from the army they would be deferred.

Mr. Smokler: Well, I object to that.

Trial Examiner Wiener: Sustained.

Q. (By Mr. Meder): Do you have any purpose in trying to defer any of them?

A. No, I wouldn't.

Mr. Meder: All right, withdraw the question.

Q. (By Mr. Meder): What have these men got to do with discharges? Supposing they catch some one in sabotage, or somebody disobeying a rule in the plant, or find them rioting, have they the right to make recommendations as to discharges?

A. Yes, they have.

Q. Going back to that contract, which is Company's Exhibit 3, this same language to which I called attention in Section 2 of Article I has been in the previous contracts which the Company has had with the International Union Local 174, has it not?

A. Yes, it was.

Q. Is there Government property on your premises?

A. Yes.

Q. Made up of what?

A. Well, there is tires, inertia starters, fifth
28 wheels, skid plates.

Q. Is it a part of the duty of these men now to protect that property?

A. Yes, it is.

Q. Do you know whether or not it is a part of the duty of these men now, not alone to protect the premises of the Company, but property in and around the premises of the Company, if anything occurring on outside property would in any way threaten the premises of the Company?

A. It is.

Q. That wasn't true heretofore, was it?

A. No.

Q. Now as far as discharging these men is concerned, does the Company still have full control over their discharges, or are the discharges subject now to the control of the army, if it desires to exercise such control?

A. Subject to the control of the army if they desire to exercise such control.

Q. You know that an attempt to intimidate these men, or to reduce or nullify their efficiency, or interfere with the performance of their mission, constitutes a violation of Federal law?

A. Yes, sir.

Q. That didn't used to be true, did it?

A. No.

29 Q. These men have all been fingerprinted, photographed, and signatures secured at the request of the army, is that correct?

A. That is right.

Q. That wasn't true heretofore, was it?

A. No.

Q. These men have the right to arrest without a warrant for violation of the sabotage act, do they not?

A. Yes.

Q. Or the violation of the espionage act, is that correct?

A. Yes, sir.

Q. They have the obligation to serve with the army in any emergency that may arise, is that true?

A. That is correct.

Mr. Meder: That is all.

Trial Examiner Wiener: Cross examination?

Mr. Smokler: Yes.

CROSS EXAMINATION

Q. (By Mr. Smokler): What does the Company now manufacture, Mr. Lutton?

Mr. Meder: That has all been stipulated, hasn't it?

A. Motor trucks for the army.

Q. (By Mr. Smokler): Motors and lorries, are they, in the nature of lorries?

A. No, I don't know just what you mean by a lorry.

Q. Well, you manufacture trucks?

30 A. Yes.

Q. That was your business prior to the war, is that correct?

A. That is right.

Q. Mr. Lutton, the protection of the plant against any

hazard is the responsibility of the Company, is it not?

A. Yes.

Q. How many of the 18 plant protection employees were employed by the Company prior to August 19, 1942?

A. Prior to that?

Q. Yes.

A. I believe about ten. I couldn't say definitely.

Q. Could you tell us briefly how long on an average the ten employees were employed by the Company?

A. Well—

Q. (Interposing): Let me put it this way. Of those ten employees the majority of them had been employed by the Company for a good many years, is that right?

A. For a number of years, that is correct.

Q. Since August 1942 they have been wearing uniforms and are required to conform with the other regulations promulgated by the army, is that correct?

A. Yes.

Q. In fact, they wore uniforms before that time?

A. Yes, they wore uniforms before that time.

Q. But you termed them, prior to August, 1942,
31 watchmen and firemen, and so on, is that correct?

A. That is correct.

Q. Since August, 1942, you now call them plant guards, is that correct?

A. Plant Protection men.

Q. Plant Protection employees?

A. That is correct.

Q. Now it is true, isn't it, Mr. Lutton, that you can swear in any of your employees as members of the auxiliary military police, provided they are physically able to perform the mission and duties of the auxiliary military police?

Mr. Meder: May we have the question before the answer?

Trial Examiner Wiener: Yes. Will you read the question?

(Question read).

Trial Examiner Wiener: Now are you objecting to the question, Mr. Meder?

Mr. Meder: I object to the question. I don't know as I have any right to object to it, but what you mean, you can have the army swear them in?

Mr. Smokler: That is right.

Mr. Meder: No objection, if that is what he means.

Trial Examiner Wiener: In answering the question, Witness, note that the language has been altered by counsel.

A. The army can swear them in, but I couldn't.

Q. (By Mr. Smokler): However, the request
32 would emanate from you, would it not?

A. No, emanate from the army.

Q. Or it may emanate from you as well, but the army would have to do the final swearing in?

Mr. Meder: Well, now, there are three questions involved there. May we have one of them? I object to the question for the reason that there are several questions in one.

Trial Examiner Wiener: That is a little involved, Mr. Smokler. If you won't be embarrassed, would you rephrase it?

Mr. Smokler: I am not embarrassed at all.

Q. (By Mr. Smokler): Who determines the number of Plant Protection employees that you are to employ or to have employed?

A. The Company.

Q. The Company does?

A. Yes.

Q. Do you, for example, if you now employ 15 or 18, and desire to employ 22, do you seek the permission of the army to employ the additional four Plant Protection employees?

A. No.

Q. The employment of all the Plant Protection employees is made through your regular personnel employment channels, is that correct?

A. That is right.

Q. You judge and determine and decide whether or not a particular individual should or should not be

33 employed as a Plant Protection employee, is that correct?

A. That is correct, but at the discretion of the army, if they want to reject them.

Q. In other words, you do the employment, subject to the discretion of the army to discharge them, if they so see fit?

A. That is correct.

Q. Has the army exercised its discretion with respect to any of your 18 Plant Protection employees?

A. No, it hasn't.

Q. You have control over your Plant Protection employees insofar as regulating their hours of work, is that correct?

A. Correct.

Q. Their wages?

A. Correct.

Q. Assignment to shifts or posts?

A. That is correct.

Q. And you have the right to discharge them or discipline them, is that correct?

A. That is correct.

Q. You have recently received a communication from the army, have you not, that auxiliary military police or Plant Protection employees are permitted to bargain collectively?

A. No.

Mr. Meder: Are you asking him to produce it?

Mr. Smokler: I am asking him whether he is fa-

34 miliar with a communication from the army which contains the statement that I have just put to the witness.

A. I have heard of such a statement.

Q. (By Mr. Smokler): Are you familiar with the contents of Circular 15?

Mr. Meder: Are you going to offer Circular 15 in evidence?

Mr. Smokler: I would if I had an additional copy. I think it ought to be offered in evidence.

Mr. Meder: I have no objection to it.
Mr. Smokler: Have you got an extra copy?
The Witness: This is an extra copy.
Trial Examiner Wiener: We have a question pending, I think, haven't we, Miss Reporter?
Mr. Meder: We are going to stipulate now, if you let us.
Trial Examiner Wiener: Off the record.

(Discussion off the record).

Trial Examiner Wiener: On the record.
Mr. Smokler: Will you mark this?

(The document referred to was marked for identification as Petitioner's Exhibit 1).

Q. (By Mr. Smokler): Mr. Lutton, I show you Petitioner's Exhibit—

Mr. Meder (Interposing): I am willing to stipulate it will go in as an exhibit, and we have received it, as part of the regulations under which we operate. It will
35 save a lot of time.
Trial Examiner Wiener: You want to offer it, Mr. Smokler?
Mr. Smokler: All right. I offer Petitioner's Exhibit 1 in evidence.
Mr. Meder: No objection.
Trial Examiner Wiener: Petitioner's Exhibit 1 will be received.

(Thereupon the document heretofore marked for identification as Petitioner's Exhibit 1 was received in evidence).

Q. (By Mr. Smokler): I take it you are familiar with Petitioner's Exhibit Number 1?
A. Yes.

Mr. Smokler: I call the Board's attention to Page 8 of Petitioner's Exhibit Number One, which deals with labor relationships concerning Plant Protection employees.
I also call the Board's attention to Page 7 of Petitioner's Exhibit Number One, Section B, entitled "Employer and Employee Relationship."

I also call the Board's attention to Section E, contained on Page 8 of Petitioner's Exhibit Number One.

I call the Board's attention to Page 10, Section E-1, under "Arms", which states that—

Mr. Meder (Interposing): It speaks for itself, the Exhibit speaks for itself.

36 Mr. Smokler: I guess it isn't necessary for me to state it, but I have it marked so the Board will be able to find it.

Trial Examiner Wiener: Are you going to quote?

Mr. Smokler: Just one sentence.

Mr. Meder: I object to one sentence being quoted out of a long page.

Trial Examiner Wiener: I will sustain the objection if you are going to brief the matter; if not, I will let you read it.

Mr. Smokler: I don't know whether we are going to brief it or not.

Mr. Meder: You will after you get my brief.

Mr. Smokler: I want to state the sentence on the record so the Board will be able to find the section I am making reference to. If Mr. Meder's objection is sustained, I will submit it as proof.

Mr. Meder: I don't desire to be facetious in what I am about to say, but I want to call the Board's attention to the whole of the exhibit. I think the whole of the exhibit is very important, no particular page, or any particular part of any page. As I understand it, the whole of the exhibit is in evidence.

Trial Examiner Wiener: That is right, Mr. Meder.

Mr. Smokler: Well, to cut this short, Mr. Examiner, I will repeat what I want the Board's attention to be

37 called to.

Mr. Meder: I object to his repeating it. You are just making this a long record and taking up a lot of time. Why repeat it?

Trial Examiner Wiener: Why don't you state the conclusions which you draw from this exhibit as a part of your position, Mr. Smokler? I certainly won't object to your

doing that. What do you think the exhibit proves in support of your contentions?

Mr. Smokler: The petition proves what the Board has already found to be the case, that is, the employer-employee relationship still exists with respect to Plant Protection employees since August 19, 1942, and that substantially it might be said that the Plant Protection employees are under the supervision and instruction of the employer and not the army.

Trial Examiner Wiener: Now will you continue with your cross?

Mr. Smokler: Yes.

Q. (By Mr. Smokler): The guns which you are now attempting to provide the Plant Protection employees are purchased by the Company, are they not?

A. That is right.

Q. And the Company purchases the uniforms of its Plant Protection employees?

A. Yes, sir.

Q. The only time that a Plant Protection employee can make an arrest is in a case of sabotage, or sus-
38 pected sabotage, or suspected espionage, is that correct?

A. (No response).

Q. Their power to arrest, in other words, is confined to those two matters?

A. Why, I don't know. I think they can make arrests for other causes inside the plant.

Q. Well, do you know that to be the case, or are you merely surmising?

A. I am quite positive of it.

Mr. Smokler. No further questions.

Mr. Meder: That is all.

Trial Examiner Wiener: You are excused.

(Witness excused).

Mr. Meder: The Company rests.

Trial Examiner Wiener: I think it can be easily inferred from the testimony already given that the Company has

what are known as war contracts, is that right, Mr. Meder?

Mr. Meder: That is correct, sir.

Trial Examiner Wiener: And if the Board should find a question concerning representation of the appropriate unit in this testimony, will the Company furnish the Regional Director with a list of eligible voters as the Company sees it?

Mr. Meder: It will do so under protest.

Trial Examiner Wiener: Does the Petitioner intend to file a brief?

39 Mr. Smokler: Petitioner does not intend to file a brief unless the Company files one, then it will file a brief.

Trial Examiner Wiener: Does the Company intend to file a brief?

Mr. Meder: Yes, sir.

Trial Examiner Wiener: Then I take it both parties intend to file them, is that correct?

Mr. Smokler: That is correct. Are you prepared at all, Mr. Examiner, to conclude the hearing?

Trial Examiner Wiener: Unless there is something further that either party desires to offer.

Mr. Smokler: I would like to have a very brief recess to determine whether I have anything additional to offer or not.

Trial Examiner Wiener: How long do you want?

Mr. Smokler: Five minutes.

Trial Examiner Wiener: Five-minute recess, gentlemen.

(A short recess was taken).

Trial Examiner Wiener: On the record.

The Company desires to recall Mr. Lutton briefly.

FORBES W. LUTTON,

a witness called by and on behalf of the Company, having been previously duly sworn, was examined and testified as follows:

RE-DIRECT EXAMINATION

Mr. Meder: Will you mark this, please?

(The document referred to was marked for
40 identification as Company's Exhibit 7).

Q. (By Mr. Meder: I show you a paper which has been marked for identification, Company's Exhibit 7, and ask you if you have seen that before?

A. Yes.

Q. Is that another one of the bulletins furnished you by the United States Headquarters District Number One, which you placed on the bulletin board?

A. Yes.

Q. That is dated April 12, 1943?

A. Yes, sir.

Mr. Meder: I offer in evidence Company's Exhibit 7.

Mr. Smokler: I will offer the same objection to the Company's proposed Exhibit 7, as I offered to Company's Exhibits 4, 5, and 6.

Trial Examiner Wiener: For the same reasons previously stated, I will receive Company's Exhibit 7.

(The document heretofore marked for identification as Company's Exhibit 7, was received in evidence).

Q. (By Mr. Meder): It is a part of the duty of the Plant Protection men, is it not, that if there is any trouble in the plant, they are supposed to go in and quiet the trouble?

A. Yes.

Q. They have to evict employees if there is any
41 eviction to take place?

A. Yes.

Q. If they see any work around there being improperly done, they have to report on that, do they not?

A. Yes, sir.

Q. Any operations not being carried on safely, they have to report on those, do they not?

A. Yes, sir.

Q. Would they have a right to stop a man from carrying on an operation in an unsafe manner—

Mr. Smokler (Interposing): I object to the question—

Q. (By Mr. Meder, continuing): —or would they report on it to the foreman, do you know?

Mr. Smokler (Continuing): —as leading and suggestive and calling for a conclusion.

Trial Examiner Wiener: Will you re-phrase the question?

Mr. Meder: I told you in asking the questions, I was going to ask them quite leading because I want to get through them.

Q. (By Mr. Meder): What authority have these Plant Protection men got as concerns any employees whom they would see doing the work, for instance, in an unsafe way?

A. Why, I believe they could stop them, take them to the foreman.

Trial Examiner Wiener: Do you know whether
42 that has always been true?

Q. (By Mr. Meder): That has always been true, hasn't it?

A. More or less.

Q. If a man were found intoxicated in the plant, they would be the ones to evict him, would they not?

Mr. Smokler: I object to that as being leading.

A. That is right.

Q. (By Mr. Meder): If a man were found intoxicated in the plant, the Plant Protection men would be the ones to evict him?

A. The Plant Protection man would.

Q. And that has occurred, has it not?

A. It has.

Q. Now if you had a strike in that plant of production workers, state whether or not it would be necessary to still use your plant guards?

A. I believe it would as long as it is government property to protect.

Q. It would be more than ever necessary to use them, would it not?

A. Yes.

Q. State whether or not it would be necessary for

them to go through picket lines in order to assume their duties.

A. They would have to assume their duties in all troubles.

Q. State whether or not in case of a strike of production workers it would be necessary for the proper
43 protection of the plant to have these Plant Protection men at work.

A. It would.

Mr. Meder: That is all.

Trial Examiner Wiener: Recross?

Mr. Meder: While we are waiting, in case of quarrels among workmen, fights among workmen, state whether or not it would be up to the Plant Protection men to stop such fighting.

A. It would.

Q. (By Mr. Meder): And it would be necessary to eject the men from the plant?

A. The Plant Protection would have to eject them.

Mr. Smokler: Any further questions, Mr. Meder?

Mr. Meder: No.

RE-CROSS EXAMINATION

Q. (By Mr. Smokler): In case of the intoxicated employee that Mr. Meder referred to in direct examination, who used to eject intoxicated employees prior to August the 19th, 1942?

A. The Plant Protection men did it then.

Q. They were called watchmen then, were they?

A. Yes.

Q. Or guards. As a matter of fact, the instances that Mr. Meder gave, in the main, were formerly the functions of the watchmen and the guards, were they not?

Mr. Meder: Wait a minute. I object to that question. I don't think it is a clear question.

44 Trial Examiner Wiener: Sustained. I think if you ask which particular duties, the question will be unobjectionable.

Q. (By Mr. Smokler): In case of quarrels among the

employees, it was formerly the function of the watchmen to intervene, to intercede in such cases, was it not?

A. Well, it was to a certain extent. Before that we didn't have enough watchmen always to intervene; it was generally up to the foreman.

Q. I see.

A. While it would have been up to a watchman, if they had been there, perhaps.

Mr. Smokler: That is all.

Mr. Meder: That is all.

Trial Examiner Wiener: Just a moment, Mr. Lutton, Within the next 30 or 60 days, do you anticipate a substantial increase or decrease in the employment of Plant Protection men?

The Witness: No, I don't.

Trial Examiner Wiener: You are excused.

(Witness excused).

Trial Examiner Wiener: Do you have any further witnesses, Mr. Meder?

Mr. Meder: No, we rest.

Trial Examiner Wiener: Does either party have anything further on this?

Mr. Smokler: Petitioner has nothing further, Mr. Examiner.

Trial Examiner Wiener: In view of the fact that both parties are going to file briefs, does either attorney desire to make a brief closing statement?

Mr. Meder: No.

Trial Examiner Wiener: None for the Company. Mr. Smokler, do you desire to make one?

Mr. Smokler: Yes.

Trial Examiner Wiener: All right, sir. And Mr. Meder may reply after he has heard it, if he cares to.

Mr. Meder: I am going to file a brief. I am not going to take up any time now.

Mr. Smokler: I will waive mine.

Trial Examiner Wiener: All right, gentlemen, the hearing is concluded. Thank you very much.

(At 12:30 o'clock p. m., Friday, May 14, 1943, the hearing in the above-entitled matter was closed.)

RESPONDENT'S EXHIBIT No. 1

CONSTITUTION
of the
INTERNATIONAL UNION
United Automobile, Aircraft
and
Agricultural Implement Workers
of America,
(UAW-CIO)
AND
LAWS GOVERNING LOCAL UNIONS

(Seal)

Adopted at Chicago, Ill.
August, 1942

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ARTICLE 6
MEMBERSHIP

SECTION 1. The International Union shall be composed of workers eligible for membership in the International Union, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, (UAW-CIO).

SECTION 2. Any person eligible to become a member of the International Union who is not affiliated with any organization whose principles and philosophy are contrary to those of this International Union as outlined in the Preamble of this Constitution, may apply for membership to the Local Union having jurisdiction over the plant in which he or she is employed. The applicant must, at the time of application, be an actual worker in and around the plant. All applicants for membership in any Local Union of the International Union shall fill out an official application provided by the International Union, answering all questions contained in such application, and sign a promise to abide by all laws, rules and regulations and the

Constitution of the International Union. All applications thus received shall be referred to the Local Union for consideration. No application shall receive consideration of a Local Union, unless the applicant has been continuously employed for a period of at least thirty days immediately preceding action or consideration thereof. (This does not apply to shops in the process of organization, on strike or victimized by lockout.) Applications for membership rejected by the Local Union shall not be reconsidered until thirty days have elapsed.

• • • • • • • • • • •

SECTION 4. The original application signed by each member shall be retained by the Local Union for its record and official receipt shall be given to each new member for all moneys paid. All receipts shall be made out in duplicate, the original to be given to the member, the duplicate to be retained by the Local Union and made available to the International Union upon request. These duplicate receipts may be destroyed after a Local Union audit upon written approval of the International Secretary-Treasurer.

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SECTION 9. All members of the Local Union are also members of this International Union and subject to the orders, rulings and decisions of this International Union and the properly constituted authorities of the same.

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ARTICLE 18

CONTRACTS AND NEGOTIATIONS

SECTION 1. It shall be the established policy of the International Union to recognize the spirit, the intent and the terms of all contractual relations developed and existing between Local Unions and employers, concluded out of conferences between the Local Union and the employers, as binding upon them. Each Local Union shall be required to carry out the provisions of contracts so negotiated.

INTERNATIONAL OFFICES, DETROIT, MICH.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT, & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CIO)

OFFICIAL APPLICATION FOR MEMBERSHIP

Name ..... L. U. No. .....
Address ..... City ..... State .....
Where Employed ..... How Long .....
Class of Work ..... Dept. No. ..... Clock No. .....
Present Rate of Pay ..... Shift .....
Were You Ever a Member of UAW-CIO ..... L. U. No. .....
(Yes or No) (If yes—what local)
New ☐ Reinstated ☐ Amount Paid .....
Date ..... Presented by .....

(over)

INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW-CIO)

Inernational Offices, Detroit, Mich.

L. U. No. ..... TEMPORARY RECEIPT
Received of ..... Amt. $ .....
Date ..... Received by .....
(This Receipt Should be Exchanged for Official Receipt When Initiated.)

RESPONDENT'S EXHIBIT No. 2

64

RESPONDENT'S EXHIBIT No. 3

AGREEMENT

THIS AGREEMENT, entered into this 1st day of April, 1942, between FEDERAL MOTOR TRUCK COMPANY, of Detroit, Michigan (hereinafter referred to as the "COMPANY"), and the INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, Affiliated with the Congress of Industrial Organizations, and its LOCAL 174 (hereinafter referred to as the "UNION").

WITNESSETH, the parties hereto mutually agree as follows:

ARTICLE I.

RECOGNITION

SECTION 1. The Company recognizes International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 174, affiliated with the C. I. O., as the exclusive bargaining agency for all the factory employees of the Company excepting those included within the classes mentioned in the following Section of this Article, for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment or other conditions of employment, provided that any individual employee shall have the right at any time to present grievances to the Management.

SECTION 2. It is mutually agreed for the purposes of this Agreement that the term "employee" shall not include foremen, assistant foremen having the right to hire and fire, office timekeepers, time study men, clerical employees, plant protection employees or confidential salaried employees, and that the Union will not solicit or accept the same for membership.

• • • • • • • •

ARTICLE VIII

DURATION

This Agreement shall become effective on the day and year first above written, and shall continue in full force and effect for a period of one (1) year, and shall continue thereafter in full force and effect from year to year un-

less notice of termination shall be given by either party thirty (30) days before the end of the year, or on any anniversary of that date. However, either party may give a thirty (30) day notice in writing of a desire to amend or modify any of the terms of the Agreement and a meeting to consider such proposal shall be had within ten (10) days. If an Agreement can be reached on such proposal, the contract will be so amended or modified.

FEDERAL MOTOR TRUCK COMPANY

By (Signed) T. R. LIPPARD
By (Signed) F. L. RUDDON
By (Signed) J. D. PORTER

INTERNATIONAL UNION, UNITED AUTOMOBILE AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C. I. O.

By (Signed) MICHAEL J. MANNING,
President, West Side Local 174 UAW-CIO
By (Signed) RICHARD T. LEONARD,
Director Region 1A, UAW-CIO

SHOP COMMITTEE

FEDERAL MOTOR TRUCK DIVISION
WEST SIDE LOCAL 174, UAW-CIO

(Signed) J. E. FALLIS
(Signed) J. E. POLLOCK
(Signed) JOSEPH W. BONNO
(Signed) C. G. NEAL
(Signed) LEO STENCIL
(Signed) KARL KOLBERG
(Signed) HAROLD JOHNSON
(Signed) A. WARDLAW
(Signed) GEORGE DEADMAN

uopwa-26-cio
meg 4-15-42

RESPONDENT'S EXHIBIT No. 4

HEADQUARTERS, SIXTH SERVICE COMMAND
INTERNAL SECURITY DIVISION
PLANT PROTECTION BRANCH
QUARTERMASTER'S SECTION
Room 1855, 20 N. Wacker Drive
CHICAGO, ILLINOIS

In reply refer to:
QM 004-PP

August 7, 1942

SUBJECT: Military Organization of Plant Guard Forces.

TO: Facilities of Importance to War Department Procurement.

1. The Secretary of War has directed that the guard forces at all plants assigned for protective survey and inspection to the Chiefs of Supply Services and to the Commanding General, Material Command, Army Air Forces, be organized, drilled and instructed as military units subject to the Articles of War.

2. These guard forces will be organized as civilian auxiliary to the Military Police in all plants where the possibility of sabotage is greatest, giving first priority to those plants which are most vulnerable from the standpoint of sabotage activities. The organization of those civilian guard forces will be extended as conditions permit.

3. At the time any guard force is organized as a civilian auxiliary to the Military Police, the commanding officer having jurisdiction over the guard force will:

(a) Cause the Articles of War prescribed by Article 110 thereof to be read and explained to each member of the guard force.

(b) Issue orders and regulations setting forth the duties and responsibilities of the guard force.

(c) Organize each guard force with a member of the Army of the United States in command and cause each force to be drilled and instructed with a view to supplementing the Army in resisting attack on war material, war premises, and war utilities which the force is assigned to guard.

(d) Require each member of the guard force to give a pledge of loyalty to the United States and to execute an agreement acknowledging that such Articles of War are understood by him and that he is subject to military law as long as he remains a member of the guard force.

4. The organization of civilian plant guards under the command of a member of the Army of the United States should not cause any change in existing systems of hiring or of compensation, of existing systems for providing uniforms and equipment, or of providing transportation and quarters.

5. While engaged in normal protective duties the status of a civilian guard force remains unchanged. When such a guard force or any member or group thereof, is acting under the command and direction of constituted military authority, such action shall be deemed to be in the capacity of a civilian auxiliary to the Military Police.

6. A commissioned officer of the Army of the United States will call at your plant for the purpose of organizing your guard force as a civilian auxiliary to the Military Police. This officer will notify you in advance of his arrival in sufficient time to enable the assembling of the guard so that the agreements with each guard may be signed and the reading of the Articles of War may be accomplished.

7. It is requested that your guard force be given this information and that they be fully apprised of the conditions thereof. Copies of the Articles of War and sample agreement are inclosed.

For Brig. General W. E. Guthner, U.S.A.,
Director of Internal Security

CHARLES S. STEWART
Major, C. E.
Chief of Section.

2 Incls.
Articles of War.
Agreement

RESPONDENT'S EXHIBIT No. 5

HEADQUARTERS, SIXTH SERVICE COMMAND
INTERNAL SECURITY DIVISION
PLANT PROTECTION BRANCH
QUARTERMASTER'S SECTION
Room 1855, 20 N. Wacker Drive
CHICAGO, ILLINOIS

Mr. Lutton
Carter

Mr. Lippard
Keenan

In reply refer to:
QM 004-PP

August 8, 1942

SUBJECT: Military Organization of Plant Guard Forces.
TO: Facilities of Importance to War Department Procurement.

1. Reference is made to communication from this office dated August 7, 1942, file and subject as above.

2. MAJOR CHARLES S. STEWART has been designated as the commissioned officer of the Army of the United States to organize your guard force as a civilian auxiliary to the Military Police, and will call at your plant during the week of August 9, 1942 for that purpose.

3. In order that the process of organization may be accomplished without delay upon the arrival of the designated officer, it is requested that you prepare a triplicate set of the inclosed agreements for each member of your guard force. The date and signature of the guard are to be left open and will be executed on the day of organization, the signature of each guard being witnessed by the officer.

For Brig. General W. E. Guthner, U. S. A.,
Director of Internal Security:

CHARLES S. STEWART
Major, C. E.
Chief of Section.

45 Incls. (Form 93-3)

Respondent's Exhibit No. 5

HEADQUARTERS, SIXTH SERVICE COMMAND
INTERNAL SECURITY DIVISION
PLANT PROTECTION BRANCH
QUARTERMASTER'S SECTION
Room 1855, 20 N. Wacker Drive

Date.....

Agreement between the United States of America and

.....

(Plant Guard)

In order that the existing military forces of the United States may be most effectively employed in combat activity against the enemies of the United States, the United States is approving the employment of certain guards as a civilian auxiliary to the military police for the purpose of guarding and protecting war material, war premises and war utilities from injury or destruction by the enemy or otherwise, including the making of arrests, as peace officers for violations of Federal laws, as well as for violations or orders and regulations issued by military authority. The United States requires that only persons physically fit, well trained in the use of arms and in the duties incident to their position, and of unquestionable loyalty to the United States be so employed.

Now, therefore, I....., who have been or am about to be employed by..... as a guard at.....for the purpose of guarding war material, war premises, and war utilities, in consideration of my employment or the continuation of my employment, do agree with the United States of America that:

(1) I will support and defend the Constitution of the United States against all enemies, foreign and domestic;

(2) I will bear true faith and allegiance to the Constitution of the United States;

(3) I will well and faithfully discharge my duty as a

civilian auxiliary to the military police to protect war material, war premises, and war utilities against all enemies, foreign and domestic, and will obey any orders issued in connection therewith by the President, as Commander-in-Chief of the Army and Navy of the United States, and by his duly authorized officers;

(4) I acknowledge that the appropriate Articles of War have been read and explained to me, and that in the performance of my duty to protect such war material, war premises, and war utilities, I am subject to military law during the period of my employment.

.....

(Signature of Plant Guard)

.....

(Signature of Army Officer)

RESPONDENT'S EXHIBIT No. 6

(Posted on Bulletin Board)

BULLETIN

The Military Training of Plant Guards will consist of such of the subjects listed below as the plant guard officer finds appropriate for each guard force giving due consideration in each instance to the character, experience, previous training, and qualifications of the force as well as the locality and geography of the plant, its importance in the prosecution of the war, and all other pertinent considerations.

1. Basic Military subjects in which training may be given include—
   (a) Military courtesy and discipline; Article of War.
   (b) Defense against air and parachute attack.

(c) Interior and special guard duty (military only).
(d) Personal encounters.
(e) Inspections.
(f) Use of weapons—hand grenades, pistol, police riot club, shotgun, tommy gun (where applicable).
(g) Military police—organization, duties, powers of arrest, use of force, etc.

2. Advanced subjects in which training may be given includes—
(a) Riot formations.
(b) Approach marches.
(c) Other applicable subjects included in military police tactical unit training.
(d) Tactical problems which may be given from time to time to determine the effectiveness of the guard force in emergency situations.

S. D. Knox, 1st Lt., Inf.
(Plant Guard Officer)

April 17, 1943.

RESPONDENT'S EXHIBIT No. 7

UNITED STATES ARMY
HEADQUARTERS DISTRICT No. 1
SIXTH SERVICE COMMAND, S. O. S.
475 Federal Building
Detroit, Michigan

Guard Order No. 1

To the Auxiliary Military Police at Federal Motor Truck Company

1. On 8/19/42 the guard forces at this plant were activated by the War Department as Auxiliary Military Police; and for military purposes will be commanded, drilled, and instructed as military units.

Respondent's Exhibit No. 7

2. All members of the guard force are subjected to the Articles of War and may be court martialed or otherwise punished for violations thereof.

3. Effective on this date 3/30/43, a commissioned officer of the Army of the United States has been placed in command. Although in command at all times, this officer has not superseded the civilian guard officers and normally will exercise direct control only in matters relating to military instruction and duties as Auxiliary Military Police.

4. The mission of this guard force is to provide protection for this plant. In addition to its normal functions the force of any member thereof whether on or off duty is available for military use in any emergency, whether it be the result of flood, conflagration, or other disaster; internal disorders hazardous to the plant property or its production; or enemy action of any nature. *No conflicting interest of any kind will be permitted to interfere with the successful accomplishment of this mission.*

5. The Government of the United States regards the protection of this plant and its production as essential in the successful prosecution of the war. The Auxiliary Military Police are ordered to provide this necessary protection and to ward off danger or threat of danger of any kind and from any source. If force must be used to accomplish this result, it will be used only to the extent reasonably necessary.

6. No member of the Auxiliary Military Police may resign without the written approval of the plant guard officer. Inattention to duty, failure to attend required drill, and conduct, unbecoming to the service may be cause of dismissal and the denial of a Certificate of Meritorious Conduct.

For the Commanding Officer,

April 12, 1943

S. D. Knox, 1st Lt., Inf.
(Plant Guard Officer)

UNION'S EXHIBIT No. 1

UNITED STATES ARMY
HEADQUARTERS DISTRICT No. 1
SIXTH SERVICE COMMAND, S. O. S.
475 Federal Building
Detroit, Michigan

April 22, 1943

Federal Motor Truck
5780 Federal Avenue
Detroit, Michigan

Gentlemen:

Inclosed herewith copy of Circular No. 15, Headquarters, Army Service Forces, War Department, Washington, D. C., dated March 17, 1943, subject "Auxiliary Military Police", for the information of your company as a matter pertaining to the organization and control of your plant guard.

It is requested that this Circular No. 15 be brought to the attention of the proper officials responsible for the functioning of your Plant Guard Forces, so that they may familiarize themselves with the duties and responsibilities of the plant guards as members of the Auxiliary Military Police, United States Army.

Respectfully yours,

A. M. Krech,
Colonel, Cavalry,
District Commander.

Incl-1
Cir. No. 15

(Cir. 15)

Union's Exhibit No. 1

WAR DEPARTMENT
Headquarters, Army Service Forces
Washington

Circular No. 15 March 17, 1943

AUXILIARY MILITARY POLICE

Circular No. 52, Headquarters, Services of Supply, August 28, 1942, subject, "The Military Organization of Plant Guard Forces," is rescinded, and the following substituted therefor:

1. *Purpose of military organization.—a.* Executive Order No. 8972, December 12, 1941, authorizes the Secretary of War (and the Secretary of the Navy) "to establish and maintain military guards and patrols, and to take other appropriate measures, to protect from injury and destruction" certain strategic premises, materials, and utilities. Accordingly, the Secretary of War directed the military organization of plant guard forces as Auxiliary Military Police (see attached letter, The Adjutant General's Office, AG 231.43 (7-2-42) MSSPAAM-M, July 2, 1942, subject, "Military Organization of Plant Guard Forces.") The purpose is to increase the authority, efficiency, and responsibility of guard forces at plants important to the prosecution of the war, and through military training to provide auxiliary forces throughout the United States to supplement the Army in wartime emergency situations.

b. Nothing in this circular will be construed as modifying the responsibility of plant managements 'for providing adequate protection at all times against all hazards," (par. 4, Memorandum No. S380-4-43, Office of the Adjutant General, Feb. 18. 1943, subject, "Responsibilities for Internal Security.") The plant guard officer (see par. 4*d*) may, however, take appropriate action through the plant management to correct any condition deemed by him to result in or threaten defective or inadequate performance by the guard forces of its ordinary protective duties.

c. The term "plants" as used in this circular includes

civilian plants and installations important to the prosecution of the war; War Department plants, posts, camps, and stations; civilian or municipal plants and facilities essential to power, communication, and transportation; other facilities and installations deemed important to the prosecution of the war.

d. The phrase "plants assigned for protective survey and inspection" used in paragraph 1, attached letter, refers to plants and facilities on the Master or Service Command Responsibility List. Before the guard forces at any civilian or municipal plant are militarized, the plant must appear on the Master or Service Command Responsibility List.

2. *Mission of the Auxiliary Military Police.*—*a.* The mission of a guard force of Auxiliary Military Police is—

(1) To provide internal and external protection of the plant against sabotage, espionage, and natural hazards.

(2) To serve with the Army in providing protection to the plant and its environs in emergency situations.

b. An emergency situation in which the Auxiliary Military Police may be called upon for military service may arise from flood, conflagration, or other disaster; internal disorders hazardous to property or production important to the prosecution of the war; enemy action by air raid; fifth column activity; paratroop attack or invasion; or it may arise from any other condition of circumstance involving the plant or its community making is necessary to place in operation one or more of the emergency plans of the War Department or of the service command.

c. A guard force or any member thereof, whether on or off duty, may be assigned to duty in an emergency at places other than the premises of the plant normally served, provided only that in the opinion of the plant guard officer or other representative of the Army in command such assignment will contribute to the protection of

the guard force's own plant and its environs or to the protection of its production.

3. *Persons eligible for membership in Auxiliary Military Police.—a.* The plant guard officer will determine in each case which groups of employees, in addition to the regular plant guard force, may become members of the Auxiliary Military Police. Persons such as firemen, watchmen, and women guards may be included provided they are able physically to perform the mission and duties of the Auxiliary Military Police described herein and in the agreement signed by the guards. Women guards may be armed, but in view of the congressional policy that women's auxiliary forces be limited to noncombatant duty, it is directed that in formulating plans for any emergency situation requiring the use of force against the enemy, such plans will provide for the assignment of any women members of the Auxiliary Military Police to noncombatant activities.

b. No minimum number of guards is required for the militarization of any guard force. Guard forces, no matter how small, will be militarized if the plants which they guard are so located that the guards can be organized, trained, and commanded efficiently by available Army personnel, and if, in the opinion of the plant guard officer, the results obtainable are commensurate with the effort involved.

c. Employment of an alien as a plant guard must be approved by the Secretary of War in the same manner as employment of an alien having access to work on classified or aeronautical contracts.

4. *Responsibility for military organization, training, and command of the Auxiliary Military Police.—a. The Provost Marshal General.*—The Provost Marshal General is charged with the general supervision of activities relating to the Auxiliary Military Police as a part of the internal security program. Requests for legal opinions relating to the Auxiliary Military Police will be made through military channels to the Provost Marshal General.

b. Commanding generals of service commands.

(1) The commanding generals of service commands are responsible for the military organization, training, and command of the guard forces at all plants and installations within their respective service commands except plants and installations which are under the continuing protection responsibility of the Navy, ports of embarkation, and plants and installation which in the opinion of the Provost Marshal General should be exempt from such organization.

(2) At ports of embarkation, the local commanding officer is responsible for the military organization, training, and command of the guard forces. The commanding general of the service command will be advised, if he so requests, of the number, location, equipment, and state of training of such guard forces, and he may make recommendations in connection therewith. The commanding general of the service command may inspect these guard forces at times convenient to the local commanding officer.

c. Commanding officer having jurisdiction over the guard forces. (See Par. 3, attached letter.)

(1) *Plants and installations having no local resident Commanding officer.*—The commanding general of the service command will designate an officer to be the commanding officer having jurisdiction over the guard forces of plants and installations at which there is no local resident commanding officer. This officer will be the commanding officer of the district of the service command in which the plant or installation is located, unless the commanding general of the service command directs otherwise.

(2) *Plants and installations with a local resident commanding officer.*—The commanding officer having jurisdiction over the guard forces of plants and installations (including ports of embarkation) at which there is a resident local commanding officer will be such commanding officer.

(3) In all matters pertaining to military organization, training, and command of the Auxiliary Military Police, the commanding officer having jurisdiction over the guard forces (except such officer at ports of embarkation) will report to the commanding general of the service command.

d. Plant guard officers.

(1) For each plant or group of plants at which there is no local resident commanding officer, the commanding generals of service commands will appoint or cause to be appointed a commissioned officer called the "plant guard officer" to have command (see par. 6*a* (1) of the guard force.

(2) At each plant where there is a local resident commanding officer, this officer will either serve as plant guard officer himself; appoint an officer from his command so to serve; or request the commanding general of the service command to appoint or cause to be appointed a plant guard officer.

(3) The plant guard officer is the member of the Army of the United States in command, see par. 3*c*, attached letter) of the guard force, and will report direct to the commanding officer having jurisdiction over the guard force (see *c*, above) on all matters pertaining to the military organization, training, and command of the Auxiliary Military Police. Noncommissioned officers from the Army of the United States will be assigned when available to the plant guard officers for the purpose of assisting in military drill and instruction.

e. Termination or change of continuing protection responsibility.

(1) If a plant at which the guard force has been organized as Auxiliary Military Police is removed from the Master or Service Command Responsibility List, the commanding general of the service command will determine whether such guard force will be continued as Auxiliary Military Police, and

trained and commanded as before, or whether its status as such will be terminated. In the latter event, each member in good standing of such force will be issued a Certificate of Meritorious Conduct (see par. 6*c*.).

(2) Should the responsibility for the continuing protection of any plant at which the guard force has been organized as Auxiliary Military Police be transferred from the Army to the Navy, each member in good standing of the force will be issued a Certificate of Meritorious Conduct prior to the actual assumption by the Navy of the responsibility for continuing protection.

5. *Activation of organization of Auxiliary Military Police.—a. Articles of War explained.*

(1) Guard forces which have not been organized as required (see par. 1, attached letter) will be assembled at the earliest practicable date by the plant management at the request of the plant guard officer. At this assembly the Articles of War as prescribed by Article of War 110 will be read and explained to each member of the guard force (par. 3*a*. attached letter) by the plant guard officer or in his absence or unavailability by some other competent person who is an officer of the Army or civilian officer of the Auxiliary Military Police. As certain of the Articles of War are generally inapplicable to Auxiliary Military Police, the foregoing directive will considered complied with if Articles 2, 58, 59, 61-64, 66, 68-74, 76, 81-83, 85, 88-90, 92-94, 96, 104, and 105 are read and explained. These Articles define certain offenses punishable by court martial of which persons subject to military law may be guilty.

(2) The Auxiliary Military Police, immediately after the Articles of War have been read and explained, will be impressed with the fact that the Government of the United States is directly interested in the security and protection of the plant and its production as essential to the successful prosecution of

the war. To this and the plant guard officer will issue and post a guard order reading, with appropriate variation to meet local conditions, substantially as follows:

Guard Order No.....

To the Auxiliary Military Police at.....

1. On (date) the guard forces at this plant were activated by the War Department as Auxiliary Military Police, and for military purposes will be commanded, drilled, and instructed as military units.

2. All members of the guard force are subject to the Articles of War and may be court martialed or otherwise punished for violations thereof.

3. Effective on this date....., a commissioned officer of the Army of the United States has been placed in command. Although in command at all times, this officer has not superseded the civilian guard officers and normally will exercise direct control only in matters relating to military instruction and duties as Auxiliary Military police.

4. The mission of this guard force is to provide protection for this plant. In addition to its normal functions, the force or any member thereof whether on or off duty is available for military use in any emergency, whether it be the result of flood, conflagration, or other disaster; internal disorders hazardous to the plant property or its production; or enemy action of any nature. *No conflicting interest of any kind will be permitted to interfere with the successful accomplishment of this mission.*

5. The Government of the United States regards the protection of this plant and its production as essential in the successful prosecution of the war. The Auxiliary Military Police are ordered to provide this necessary protection and to ward off danger or threat of danger of any kind and from any source. If force must be used to accomplish this result, it will be used only to the extent reasonably necessary.

6. No member of the Auxiliary Military Police may resign without the written approval of the plant guard officer. Inattention to duty, failure to attend required drill, and conduct unbecoming to the service may be cause of dismissal and the denial of a Certificate of Meritorious Conduct.

For the Commanding Officer, ...District:

.....
(Date)

.....
(Plant guard officer)

The foregoing guard order will be issued in accordance with the provisions of *c* below.

b. *Pledge and agreement.*

(1) At the time of reading the Articles of War, each member of the guard force will give the pledge of loyalty to the United States and execute the agreement, prescribed form of which is shown in the inclosure to the attached letter. A separate pledge or oath is not required. If a guard refuses to sign the agreement, he may (but need not) be temporarily retained with the understanding that he will be dismissed as soon as replaced, and in any event within a reasonable time. The signed agreement will be retained by the plant guard officer. The guard force will be considered as a civilian auxiliary to the Military Police when 75 percent of the guards at a given plant have signed the agreement (see par. 3, attached letter). A certificate of membership in the Auxiliary Military Police will be issued each member. Forms will be supplied to the commanding generals of service commands by the Provost Marshal General.

(2) Each plant guard who becomes a member of the Auxiliary Military Police continues as such until he is released from his obligations. This will take place when competent military authority has approved of his dismissal or resignation (see par. 6b)

or when he has been discharged without honor (see par. 6*c*.)

c. Auxiliary Military Police orders and regulations.

(1) Orders and regulations for the Auxiliary Military Police from the military authority will be issued in the name of the commanding officer having jurisdiction over the guard forces (see par. 4*c*.)

(2) At civilian-operated plants, such orders will be issued only after consultation with and, if possible, concurrence by the plant management.

6. *Status of Auxiliary Military Police.*—a. *Control.*

(1) The Auxiliary Military Police will continue to function as formerly, except that a member of the Army of the United States will be in command at all times, and except that they will be trained and instructed with a view to supplementing the Army in affording protection in emergency situations (see par. 2*b*.). Control, therefore, will be exercised as heretofore through the plant management except at drill and except in emergency situations. Although the plant guard officers will be in command at all times, they will not supplant the civilian guard officers, and unless expediency demands otherwise will exercise their authority through the chain of command established by the plant management.

(2) The Auxiliary Military Police are supplementing the Army of the United States in a vital task of protecting war material and war production facilities. Attempts to intimidate them or to reduce or nullify their efficiency, or interfere with the performance of their mission, may constitute a violation of Federal as well as state criminal laws. When such incidents are suspected, an inquiry will be made and a detailed report will be sent immediately through channels to the office of the Provost Marshal General as a basis for requesting an investigation or prosecution.

b. Employer-employe relationship.

(1) Basically, the militarization of plant guard forces does not change the existing systems of hiring, compensation, and dismissal; all remain primarily a matter between the guards and the plant managements. Guards in the employ of a private employer may, as heretofore, be dismissed by that employer, and those who are Civil Service employees in the employ of the War Department may be dismissed by the local commanding officer in accordance with Civil Service regulations. In neither case is a court martial necessary.

(2) A member of the Auxiliary Military Police may not be employed or dismissed and may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant's guard force would be impaired and declines to give his approval thereto.

c. Certificate of Meritorious Conduct.—A Certificate of Meritorious Conduct will be issued to each member of the Auxiliary Military Police whose service is terminated honorably. Forms will be supplied to the commanding generals of service commands by the Provost Marshal General. In the event of termination of service under conditions other than honorable, no such certificate will be issued. The commanding general of the service command may authorize a communication to each member of the Auxiliary Military Police whose service is terminated under conditions other than honorable, which will state only the fact of termination, the date, and that the communication is not a Certificate of Meritorious Conduct.

d. Discharge without honor.—If a member of the Auxiliary Military Police permanently quits his employment without approval of the plant guard officer or other duly authorized officer, a notice substantially as follows may be transmitted to him and a copy posted on the plant bulletin board:

Union's Exhibit No. 1

SUBJECT: Discharge without honor.

TO:

This is to notify you that you are discharged without honor as a member of the Auxiliary Military Police. A copy of this discharge and full statement of facts concerning your absence from duty without leave are being furnished the Provost Marshal General and the Selective Service System, Washington, D. C., for such further action as may be deemed appropriate.

By command of (Commanding General,

.....service command;

.....

Discharge without honor will be regarded as exceptional procedure applicable to exceptional cases when the guard in fact is no longer in the employ of the company and is not available for dismissal, suspension, or reprimand. It should be used only after careful investigation of the facts, which may include a hearing if deemed advisable.

e. Appeal from dismissal.—A member of the Auxiliary Military Police employed by a civilian employer, discharged without honor or dismissed by or at the request of the plant guard officer or other authorized War Department representative (except by court martial proceedings), may, within 30 days of such discharge or dismissal, appeal through channels to the next superior Army authority in writing to reconsider such action. Such appeal will include a brief signed statement of the reasons for regarding the action unjust. If a member of the Auxiliary Military Police is discharged without honor or dismissed for an offense constituting a violation of the Articles of War, he may ask for a trial by court martial.

f. Employee benefits.—The status of the employer in respect to the employee benefits for the guard force is not changed. For example, social security, workmen's compensation, and employer's liability provisions remain unaffected. Employers should have a clear understanding with their insurance companies concerned.

Union's Exhibit No. 1

g. Contractual relations.—It is not anticipated that the organization of plant guards as Auxiliary Military Police necessitates changes in existing contracts with the Government, but in any exceptional case where such alterations are essential to carry out the organization, arrangements to effect the necessary changes will be initiated by the plant guard officer with the least delay possible.

h. Labor relationships.

(1) If any proposed labor agreement is being considered which involves plant protection employees who are or may become members of the Auxiliary Military Police, the contracting parties will be urged to insert in such agreement a provision substantially as follows:

"It is understood that for the duration of the war this agreement is in all respects subject to the provisions of the directives of the War Department concerning military organization of the plant guard forces (letter, The Adjutant General's Office, AG 231.43 (7-2-42) MS-SPAAM-M, July 2, 1942, subject, "Military Organization of Plant Guard Forces"; and Circular No. 15, Headquarters, Army Service Forces, March 17, 1943, subject, "Auxiliary Military Police," and any amendments thereto), and that nothing contained in this agreement will be construed in any way to interfere with the organization, efficiency, training, and control by the War Department of the company guard force as an Auxiliary to the Military Police, nor to abrogate or interfere with the duties, responsibilities, and rights imposed by the War Department upon any employee in such Auxiliary Military Police."

(2) Auxiliary Military Police are permitted to bargain collectively, but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police. In view of recent decisions by the National Labor Relations Board (see In re Lord Mfg. Co. & United Rubber

Workers of America, CIO, Case No. R-4826, February 1943), the Auxiliary Military Police should be represented in collective bargaining with the management by a bargaining unit other than that composed of the production and maintenance workers, although both bargaining units may be affiliated with the same labor organization. Where the guards are not now included in the same bargaining unit, this is mandatory; where the guards are included in such unit, serious consideration will be given to effect a change to conform to the foregoing policies.

7. *Qualifications and equipment of Auxiliary Military Police.—a. Physical fitness.*—A member of the Auxiliary Military Police must be physically fit to perform his duties properly and in an efficient manner. It is sufficient if his physical fitness satisfies the plant guard officer.

b. Uniform.—Each member will be properly uniformed by the plant. A complete uniform consisting of blouse or shirt, trousers, and hat is not required although the complete uniform is preferred. The plant guard officer will determine, with due regard to all circumstances, whether his guard force is "properly uniformed."

c. Distinctive insignia.

(1) Because the mission of the Auxiliary Military Police includes service with the Army (see par. 2*b*), the laws of war require that members wear distinctive insignia or marks capable of recognition at a distance. By wearing such insignia or marks members serving with the Army will be recognized as legitimate troops and not deemed irregulars or guerillas. Accordingly, members of the Auxiliary Military Police will wear either—

(a) An arm band (brassard), white, with the words "Auxiliary Military Police" in blue, such as has been distributed to commanding generals of service commands for issuance; or

(b) A badge or patch which may be worn on the right or left sleeve, at the shoulder or cuff level, or on

the right or left breast pocket, either of a design substantially similar to the drawing attached to the letter, Office of the Provost Marshal General, SPMGS 231.4, November 28, 1942, subject, "Distinctive Insignia for Auxiliary Military Police," or of any other design, capable of recognition at a distance, bearing the words "Auxiliary Military Police," and approved by the commanding general of the service command.

Commanding generals of service commands will determine the device that will be worn by a given guard force and the manner and time of wearing it. Badges or patches must be procured by the plants adopting them, at their own expense, and may be manufactured of any noncritical material. Commanding generals of service commands may also authorize plants to procure at their own expense arm bands, similar in appearance to those already issued, of any color combination capable of recognition at a distance and manufactured of any noncritical material.

(2) Each member of the Auxiliary Military Police is authorized to wear a service stripe for each six months of service faithfully performed. Service stripes will be in accordance with Army Regulations (see par. 27*c*, AR 600-35, Nov. 10, 1941, "Personnel—Prescribed Service Uniform"; par 46*c*, AR 600-40, Aug. 28, 1941, "Personnel—Wearing of the Service Uniform"), except that they will conform in material and color to the chevrons furnished by the plant management to noncommissioned officers of the guard force.

(3) Commanding generals of service commands may authorize a guidon for an Auxiliary Military Police force which has shown itself outstanding in training, appearance, and efficiency.

d. Identification cards.—Each member of the Auxiliary Military Police must carry at all times an identification

card bearing his photograph, fingerprints, signature, and description properly authenticated by the plant guard officer. As no special form of card is required, existing cards which can be made to satisfy all of these requirements may be utilized. The description of the guard need not be in detail, and will be sufficient if it contains easily recognizable characteristics such as color of hair and eyes, height, weight, and age.

e. Arms.

(1) The Auxiliary Military Police must be armed with appropriate weapons furnished by the plant management if such arming is recommended by the plant guard officer. Any sidearm, rifle, or shotgun may be an appropriate weapon depending on the circumstances. Training in the use of firearms and providing ammunition therefor are functions of the plant management. If the plant guard officer determines that the Auxiliary Military Police are not sufficiently trained in the use of firearms or are not adequately qualified in marksmanship, he may require the plant management to give further training and when he deems it desirable may accomplish such training himself.

(2) The Auxiliary Military Police, as agents of the Federal Government, will not be subject to any state or municipal requirement which conflicts with their wartime duties. A member of the Auxiliary Military Police required to be armed in performance of his duties will not be compelled to obtain a license, permit, or bond to possess small firearms in order to comply with local statutes or ordinances. State authorities have concurred when this question has been presented. The full cooperation of state and local authorities will be obtained and local requirements met unless a satisfactory understanding is reached.

f. Deputizing.—In general, there will be no considerable additional advantage in deputizing members of the Auxi-

liary Military Police as sheriffs or marshals. However, there will be individual cases in which it will be advisable to continue the local or state official capacity. The authority of the plant guard includes power to arrest without a warrant for violation of the Sabotage Act (50, U.S.C., 101-106) or the Espionage Act (50, U. S. C., 21 and 32).

g. Training.

(1) The plant management continues to be charged with the training of its guard forces in their ordinary protective duties. In addition, the guard force must be qualified to perform its mission as set forth in paragraph 2*a*. This includes the ability to serve efficiently with the Army in any emergency situation that may arise (see par. 2*b*). To this end, the Auxiliary Military Police will be trained by or under the direction of the plant guard officer in military subjects to the extent he deems necessary. The use of experienced personnel from within the guard force for the purpose of conducting such training will be encouraged by the plant guard officer. The time to be devoted to such training will be determined by the plant guard officer. It will not exceed one hour per week or its equivalent except with the approval of the plant management.

(2) The military training will consist of such of the subjects listed in (3) and (4) below as the plant guard officer finds appropriate for each guard force, giving the consideration in each instance to the character, experience, previous training, and qualifications of the force as well as the locality and geography of the plant, its importance in the prosecution of the war, and all other pertinent considerations.

(3) Basic military subjects in which training may be given include—

(a) Military courtesy and discipline; Articles of War.

(b) Defense against air and parachute attack.
(c) Interior and special guard duty (military only).
(d) Personal encounters.
(e) Inspections.
(f) Use of weapons—hand grenades, pistol, police riot club shotgun, tommy gun (where applicable).
(g) Military police—organization, duties, powers of arrest, use of force, etc.

(4) Advanced subjects in which training may be given includes:
(a) Riot formations.
(b) Approach marches.
(c) Other applicable subjects included in military police tactical unit training.
(d) Tactical problems which may be given from time to time to determine the effectiveness of the guard force in emergency situations.

(5) Judgment, initiative, imagination, and a cooperative relationship with the plant management are essential in determining the kind and amount of training to be given. Not only will the training requirements vary in different plants, but the requirements within a given guard may vary. Guards will not be required to attend drill or instruction covering subjects in which they are already trained and qualified. Training films, film strips, and film bulletins are regarded as valuable in the military training of Auxiliary Military Police, and the plant guard officer will encourage their use. The necessary projecting equipment, in which there may be a shortage, may often be borrowed from local clubs and similar organizations. The objective of all training is to increase the efficiency of the Auxiliary Military Police, and unless this is accomplished the plant guard officer has failed in his mission.

8. *Subjection of Auxiliary Military Police to military law.—a. Court martial jurisdiction.*

(1) The commanding generals of service commands

have general court martial jurisdiction over the plant guard forces within the geographical limits of their commands. The commanding officer of any War Department owned and operated plant and the commanding officer having jurisdiction over the guard forces (see par. 4*c*) have the power to appoint special and summary courts martial, subject to the right of superior authority to appoint such courts when deemed desirable. The commanding officer having jurisdiction over the plant guard forces may also appoint summary courts martial subject to the same right of superior authority to appoint such courts; except that when the plant guard officer is the only commissioned officer present with a plant guard command, he will be the summary court martial of that command and will hear and determine cases brought before him.

(2) The plant guard officer also has the summary disciplinary authority of a company commander pursuant to Article of War 104. Attention is directed to the fact that an offender may not be summarily punished if he demands trial by court martial and also that if, after consenting to receive summary punishment, he deems his punishment too severe he may appeal to the next superior authority for review. Court martial jurisdiction exists at all times, even while the Auxiliary Military Police are off duty. However, it is inadvisable to order a court martial for offenses committed while off duty and not within the plant premises, unless the offense is directly connected with the individual's duties as a member of the Auxiliary Military Police.

(3) Pending instructions to the contrary, no court martial proceeding of any nature involving a member of the Auxiliary Military Police will be commenced without the prior approval of the War Department.

b. Discipline—The institution of a court martial proceeding will be resorted to only in cases where no other form of punishment will be effective. If the offense in-

volves a violation of a criminal statute or ordinance other than the Articles of War, the individual will be turned over to the civil law enforcement officials.

c. Confinement.—In the absence of an adequate guardhouse or place of confinement, offenders will be confined at the nearest military post having a guardhouse, or turned over to the United States marshal for custody. United States marshals usually have arrangements with the state or local civil authorities for the confinement of prisoners.

d. Punishment.—Unlike the court martial punishment of a person in military service, a court martial cannot punish a member of the Auxiliary Military Police by reduction in military grade or by forfeiture of pay and allowances. Analogous punishments might be imposed, such as reduction in grade in the guard organization or temporary suspension from duty. A fine, as distinguished from forfeiture, is regarded as an appropriate form of punishment.

e. Dealing with civil authorities.—When a member of the Auxiliary Military Police injures or kills a person while in the performance of his duties, he will be arrested and detained. If a civil police official seeks to arrest him, the plant guard officer, under the authority of the 74th Article of War, may refuse to release the individual until such release is approved by the commanding general of the service command. A member of the Auxiliary Military Police is entitled to the same protection as a sentinel under similar circumstances. If a writ of habeas corpus is issued for a member of the Auxiliary Military Police held to answer by the military, the procedure of chapter XXVII, Manual for Courts Martial 1928, should be followed.

f. Recognition of meritorious conduct.

(1) Members of the Auxiliary Military Police are eligible for the decoration "Medal of Merit" authorized by the President for award to civilians who distinguish themselves by exceptionally meritorious con-

duct or by performance of outstanding services. (See Bull. 1, WD, 1943.) All cases of members of the Auxiliary Military Police who, in the opinion of the plant guard officer, deserve consideration for this award will be referred through channels to the office of the Provost Marshal General for transmission to the Medal of Merit Board. A full statement of facts and appropriate recommendations will be included.

(2) Any case of meritorious conduct which in the opinion of the plant guard officer does not warrant recommendation for the award of the Medal of Merit, but which he deems deserving of official commendation, will be the subject of a special order of commendation issued by the commanding officer having jurisdiction over the guard force (see par. 4*c*). Such special orders will be issued promptly and with liberality, and will be given appropriate publicity, particularly among the guard force concerned. A copy of each such special order will be furnished to the employer.

g. Prior instructions rescinded.—The instructions contained in all other letters and circulars concerning the organization, training, and command of plant guard forces except the attached letter are rescinded.

(SPX 231.43 (2-27-43)SPMGS-MP-FH)

By Command of Lieutenant General SOMERVELL:

W. D. Styer,
Major General, General Staff Corps,
Chief of Staff.

OFFICIAL:
H. B. Lewis,
Brigadier General,
Adjutant General.

I Incl.

Union's Exhibit No. 1

(Cir. 15)

WAR DEPARTMENT
The Adjutant General's Office
Washington

AG 231.43 (7-2-43)MS-SPAAM-M

SUBJECT: Military Organization of Plant Guard Forces.

TO: The Commanding General,
Material Command, Army Air Forces;
The Provost Marshal General;
The Chiefs of Supply Services.

1. Guard forces at all War Department plants, posts and stations controlled or operated by the Supply Services or by the Army Air Forces, and at all plants assigned for protective survey and inspection to the Chiefs of Supply Services and to the Commanding General, Materiel Command, Army Air Forces, are to be organized, drilled and instructed as military units subject to the Articles of War. (Art. 2 (d)).

2. These guard forces will be organized as a civilian auxiliary to the Military Police in all ammunition plants and plants where the possibility of sabotage is greatest, giving first priority to those plants which are most vulnerable from the standpoint of sabotage activities. The organization of these civilian guard forces will be extended as rapidly as conditions permit to civilian plants having important government contracts. Priorities will be established in collaboration with The Provost Marshal General.

3. At the time any guard force is organized as a civilian auxiliary to the Military Police, the commanding officer having jurisdiction over the guard force will:

a. Cause of Articles of War prescribed by Article 110 thereof to be read and explained to each member of the guard force;

b. Issue orders and regulations setting forth the duties and responsibilities of the guard force;

c. Organize each guard force with a member of the Army of the United States in command and cause each force to be drilled and instructed with a view to supplementing the Army in resisting attack on war material, war premises, and war utilities which the force is assigned to guard.

d. Require each member of the guard force to give a pledge of loyalty to the United States, and to execute an agreement acknowledging that such Articles of War are understood by him and that he is subject to military law as long as he remains a member of the guard force. (A draft of a form of such agreement is attached.)

By order of the Secretary of War:

(s) J. A. Ulio,
Major General,
The Adjutant General.

1 Inclosure.
Draft of Agreement.

COPIES FURNISHED:
The Under Secretary of War;
The Commanding Generals, Army Air Forces;
Services of Supply.
The Inspector General;
The Judge Advocate General;
The Chief of Administrative Services
Staff Divisions of the Services of Supply
Divisions of the War Department
General Staff.

Inclosure to ASF Circular No. 15,
March 17, 1943.

CASE NO. VII-C-1209

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

SEVENTH REGION

In the matter of—

FEDERAL MOTOR TRUCK COMPANY,

and

AMALGAMATED PLANT PROTECTION LOCAL UNION No. 114, UAW-CIO

Case No. 7-C-1209

CHARGE

Board's Exhibit No. 1-A

(Filed July 24, 1943)

Pursuant to Section 10 (*b*) of the National Labor Relations Act, the undersigned hereby charges that Federal Motor Truck Company at 5780 Federal Street, Detroit, Michigan, employing 600 workers in the manufacture of war products, has engaged in and is engaging in unfair labor practices within the meaning of Section 8 subsections (1) and (5) of said Act, in that

On or about July 15, 1943, Amalgamated Plant Protection Local No. 114, UAW-CIO, pursuant to the Board's Decision dated June 8, 1943, and Certification of Representatives dated July 16, 1943, requested the company to negotiate a contract.

On or about July 20, 1943, the company replied by letter that it would not bargain collectively with the Union.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the full name, local number, and affiliation of organization, and name and official position of the person acting for the organization.)

AMALGAMATED PLANT PROTECTION LOCAL
No. 114, UAW-CIO,
By: IRVING E. GRIFFETH, *President*,
907 Hofmann Building, Detroit—CA 5490.

Subscribed and sworn to before me this 23rd day of July, 1943 at Detroit, Michigan.

(SEAL) CHARLOTTE ANERBUETZ, *Field Examiner*,
N. L. R. B., 7th Region.

COMPLAINT

(Issued October 30, 1943)

It having been charged by Amalgamated Plant Protection Local No. 114, UAW-CIO, that Federal Motor Truck Company, a corporation, herein called respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, 49 Stat. 449, herein called the Act, the National Labor Relations Board, herein called the Board, by the Regional Director for the Seventh Region, as agent of the Board, designated by the National Labor Relations Board Rules and Regulations, Series 2, as amended, hereby issues its complaint and alleges the following:

1. Respondent is and at all times herein mentioned was a corporation organized and existing under the laws of

the state of Michigan, having its principal office and places of business in Detroit, Michigan, where it owns and maintains three manufacturing plants and is engaged in the general manufacture and assembly of motor trucks and truck parts.

2. In the course and conduct of its business in Detroit, Michigan, respondent causes and has at all times herein mentioned continuously caused large quantities of raw materials, fabricated and partially fabricated articles and merchandise to be purchased and transported in interstate commerce from and through states of the United States other than the state of Michigan to its place of business in Detroit, Michigan, and causes and has at all times herein mentioned continuously caused large quantities of said finished products or partly finished products to be sold by it, transported and distributed in interstate commerce from its place of business in Detroit, Michigan, into and through states of the United States other than the state of Michigan.

3. Amalgamated Plant Protection Local No. 114, UAW-CIO, herein called the union, is a labor organization within the meaning of Section 2, subsection (5) of the Act and admits to membership certain of respondent's employees.

4. The employees of respondent at its plants in Detroit, Michigan, engaged in plant protection, excluding the plant engineer, the assistant chief of plant protection and other supervisory employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (a) and 9 (b) of said Act.

5. On July 3, 1943, and at all times thereafter, a majority of the employees in the above-described unit had designated the union as their representative for collective bargaining with respondent in respect to rates of pay, wages, hours of employment and other conditions of employment, said designation having been made by said employees at an election by secret ballot conducted by the Board pursuant to the said Act and the Rules and Regulations of the Board. On July 3, 1943, the union was and at all times since has been the sole representative for

collective bargaining as aforesaid of a majority of the employees in said unit and was and has been by virtue of Section 9 (a) of said Act the exclusive representative for all employees in said unit for collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment.

6. On July 16, 1943, the Board pursuant to Section 9, subsection (c) of the Act certified the union as the exclusive representative of all the employees in said unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment, and on the same date the Board's said certification was duly served upon respondent.

7. On or about July 15, 1943, the union requested respondent to bargain collectively with it on behalf of the employees in the said unit concerning rates of pay, wages, hours of employment and other conditions of employment. On or about July 20, 1943, and at all times since respondent refused and still refuses to bargain collectively with the union on behalf of the employees in said unit.

8. By its act of refusal to bargain collectively with the union on behalf of the employees in said unit concerning rates of pay, wages, hours of employment and other conditions of employment respondent did engage in and is engaging in unfair labor practices within the meaning of Section 8, subsection (5) of the Act.

9. By the acts hereinbefore set forth in Paragraph 7, respondent has interfered with, restrained and coerced and is interfering with, restraining and coercing its employees in the exercise of rights guaranteed to them in Section 7 of the Act and has thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8, subsection (1) of the Act.

10. The acts of respondent hereinbefore set forth in Paragraphs 7 and 8 occurring in connection with the operations of respondent's business hereinbefore set forth in Paragraphs 1 and 2, inclusive, have a close, intimate and substantial relation to trade, traffic and commerce among the several states, have led to and tend to lead to

labor disputes burdening and obstructing commerce and the free flow of commerce.

11. The acts of respondent hereinbefore set forth constitute unfair labor practices affecting commerce within the meaning of Section 8, subsections (1) and (5) and Section 2, subsections (6) and (7) of the Act.

Wherefore, the National Labor Relations Board on the thirtieth day of October, 1943, issues its complaint against Federal Motor Truck Company, a corporation, respondent herein.

HAROLD A. CRANEFIELD,
Acting Regional Director,
National Labor Relations Board,
Seventh Region.

NOTICE OF HEARING

(Signed October 30, 1943)

PLEASE TAKE NOTICE that on the 15th day of November, 1943, at 10:00 A. M., in the Hearing Room of the National Labor Relations Board, 1332 National Bank Building, Detroit, Michigan, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

A copy of the Charge upon which the Complaint is based is attached hereto.

You are further notified that you have the right to file with the undersigned Acting Regional Director, acting in this matter as agent of the National Labor Relations Board, an answer to the said Complaint within ten (10) days from the service thereof.

PLEASE TAKE NOTICE that duplicates of all exhibits which are offered in evidence will be required unless, pursuant to request or motion, the Trial Examiner in the exercise of his discretion and for good cause shown, directs that a given exhibit need not be duplicated.

IN WITNESS WHEREOF the National Labor Relations Board has caused this, its Complaint and Notice of Hearing, to be signed by the Acting Regional Director for the Seventh Region on this 30th day of October, 1943.

HAROLD A. CRANEFIELD,
Acting Regional Director,
(SEAL) National Labor Relations Board.

ANSWER OF FEDERAL MOTOR TRUCK COMPANY
Board's Exhibit 1-C

(Sworn to November 2, 1943)

NOW COMES Federal Motor Truck Company, a Michigan corporation, and answering the Complaint herein states:

1. Answering paragraph 1, it admits the contents thereof.

2. Answering paragraph 2, it admits the contents thereof.

3. Answering paragraph 3, it admits the contents thereof.

4. Answering paragraph 4, it denies the contents thereof for the reasons heretofore asserted by it in "In the Matter of Federal Motor Truck Company and Amalgamated Plant Protection Local Union No. 114, UAW-CIO," Case No. R-5356, National Labor Relations Board.

5. Answering paragraph 5, it denies that the unit is a proper unit, and alleges as the reasons therefor the matter contained in the preceding paragraph of this Answer.

Further answering said paragraph, the Company is without definite knowledge and therefore leaves the Board to its proofs.

6. Answering paragraph 6, it admits the contents thereof.

7. Answering paragraph 7, it admits the contents thereof.

8. Answering paragraph 8, it denies the contents thereof for the reasons set forth in paragraph 5 of this Answer.

9. Answering paragraph 9, it denies the contents thereof for the reasons set forth in paragraph 5 of this Answer.

10. Answering paragraph 10, it denies the contents thereof.

11. Answering paragraph 11, it denies the contents thereof because of the matters set forth in paragraphs 5 and 10 of this Answer.

WHEREFORE, the Company prays that the Complaint be dismissed.

FEDERAL MOTOR TRUCK COMPANY,
By T. R. LIPPARD, *President.*

BEAUMONT, SMITH & HARRIS,
Attorneys for the Company.

ALBERT E. MEDER,
Of Counsel.
11th floor Ford Building,
Detroit, Michigan.

STATE OF MICHIGAN, } ss:
COUNTY OF WAYNE }

T. R. LIPPARD, being duly sworn, deposes and says that he has read the foregoing Answer and that the same is true and that as president of Federal Motor Truck Company he is authorized to sign the same for and on behalf of the Company.

T. R. LIPPARD.

Subscribed and sworn to before me this 2nd day of November, 1943.

(SEAL) HERBERT H. PENNY, *Notary Public*, Wayne County, Michigan.

My commission expires November 18, 1944.

STIPULATION

Board's Exhibit 2

(Dated November 15, 1943)

It is hereby stipulated and agreed by and between Federal Motor Truck Company, herein referred to as the company, by its attorneys of record, and Max Rotenberg, attorney for the National Labor Relations Board, herein referred to as the Board, for the purpose of the above entitled proceeding only:

1. Federal Motor Truck Company is a Michigan corporation having its principal place of business in Detroit, Michigan. In peace time its business consisted of the manufacture of motor trucks, bodies, cabs and parts. At the present time the company is wholly engaged in the manufacture of trucks and truck parts for the United States Army. The company owns and operates three manufacturing plants, all located in Detroit, Michigan. The principal raw materials used by the company in its manufacturing business are wood, steel, lumber, tires and parts.

2. In the calendar year 1942, the company purchased raw materials from points located outside the state of Michigan valued at approximately $10,400,000.00. During the same period the company made deliveries of finished products to points outside the state of Michigan totaling approximately $25,000,000.00.

3. The company is engaged in interstate commerce within the meaning of Section 2, subsections (6) and (7) of the National Labor Relations Act.

Dated at Detroit, Michigan, this fifteenth day of November, 1943.

FEDERAL MOTOR TRUCK COMPANY,
By: BEAUMONT, SMITH & HARRIS,
Attorneys at Law,
By: ALBERT E. MEDER,
Attorney at Law.

MAX ROTENBERG, *Attorney,*
National Labor Relations Board,
Seventh Region.

INTERMEDIATE REPORT

(Dated November 23, 1943)

Mr. Max Rotenberg, for the Board.

Beaumont, Smith & Harris, by *Mr. Albert E. Meder,* of Detroit, Michigan, for the respondent.

Mr. Maurice Sugar, Mr. N. L. Smokler, and *Mr. Irving E. Griffeth,* of Detroit, Michigan, for the Union.

STATEMENT OF THE CASE

Upon a charge duly filed on July 24, 1943, by Amalgamated Plant Protection Local No. 114, UAW-CIO, herein called the Union, the National Labor Relations Board, herein called the Board, by its acting Regional Director for the Seventh Region (Detroit, Michigan), issued its complaint, dated October 30, 1943, against Federal Motor Truck Company, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of

the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint accompanied by notice of hearing were duly served upon the respondent and the Union.

With respect to the unfair labor practices the complaint alleged in substance: (1) that the employees of respondent at its plants in Detroit, Michigan, engaged in plant protection, excluding the plant engineer, the assistant chief of plant protection and other supervisory employees, constitute a unit appropriate for the purposes of collective bargaining; (2) that a majority of the employees in the aforesaid appropriate unit designated the Union as their representative for the purposes of collective bargaining at an election conducted by the Board on July 3, 1943; (3) that at all times since July 3, 1943, the Union has been the exclusive representative of all employees in said appropriate unit; (4) that on July 16, 1943, the Board certified the Union as the exclusive representative of all employees in said unit for the purposes of collective bargaining; (5) that on or about July 15, 1943, the Union requested the respondent to bargain collectively; (6) that on or about July 20, 1943, and at all times since, the respondent refused and still refuses to bargain with the Union; and (7) that by such refusal, the respondent interfered with, restrained and coerced its employees in the rights guaranteed in Section 7 of the Act.

On November 4, 1943, the respondent filed an answer, denying the appropriateness of the unit and the commission of any unfair labor practices, but admitting the Board's certification of the Union, the Union's request to bargain and the respondent's refusal to bargain.

Pursuant to notice, a hearing was held on November 15, 1943, at Detroit, Michigan, before the undersigned Trial Examiner, duly designated by the Chief Trial Examiner. The Board, the respondent and the Union were represented by counsel. All parties participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties. At the close of the whole case, counsel, both for the Board and the respondent,

moved to conform the pleadings to the proof, as to names and dates. The motions were granted without objection. Although afforded an opportunity to do so, none of the parties argued orally before the undersigned. Pursuant to permission granted at the hearing, the respondent filed a brief.

Upon the entire record in the case, the undersigned makes the following:

Findings of Fact

I. The business of the respondent

Federal Motor Truck Company is a Michigan corporation, having its principal place of business at Detroit, Michigan. Normally, it is engaged in the production of motor trucks, bodies, cabs and parts, but at present it is wholly engaged in the manufacture of trucks and truck parts for the United States Army. For these purposes it operates three plants, all of which are located in Detroit, Michigan. In the calendar year 1942, the respondent purchased raw materials from points located outside the State of Michigan valued at approximately $10,400,000. During the same period the respondent made deliveries of finished products to points outside the State of Michigan totaling approximately $25,000,000.

At the hearing the respondent stipulated that it is engaged in commerce within the meaning of the Act.

II. The organization involved

Amalgamated Plant Protection Local No. 114, UAW-CIO is a labor organization which admits to membership employees of the respondent.

III. The unfair labor practices

The refusal to bargain

1. The appropriate unit and representation by the Union of a majority therein

On June 8, 1943, the Board issued a Decision and Direc-

tion of Election (Case No. R-5356)[1] finding, among other things, that all plant protection employees of the respondent engaged at its three Detroit plants, excluding the plant engineer, the assistant chief of plant protection, and all supervisory employees, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

On July 3, 1943, an election was held pursuant to said Direction of Election. On July 16, 1943, the Board certified the Union as the representative of the employees in the unit heretofore mentioned, for the purposes of collective bargaining.

At the hearing the respondent did not question the fact that the Board had certified the Union as the representative of its employees, but contested the appropriateness of the unit and the subsequent certification of the Union by the Board.[2] By stipulation the record in Case No. R-5356 was made a part of the record in the instant proceeding; the respondent did not adduce any additional evidence on the question of the appropriateness of the unit.

The undersigned finds, in accordance with the Board's previous determination, that all plant protection employees

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[1] *Matter of Federal Motor Truck Company and Amalgamated Plant Protection Local Union No. 114, UAW-CIO.*

[2] At the hearing, counsel for the respondent made the following statement:

"The position of the Federal Motor Truck Company is, in the first place, that the Plant Protection men are a part of the supervision, part of management. Therefore, the Company should not be required under the Act to recognize the bargaining agency for them; that the men here involved are militarized Plant Protection men, and as such, in this case, are not employees within the meaning of the Act; that it would be contrary to public policy to include militarized Plant Protection men such as these men, within the Act; that it is not within the legal discretion of the Board to issue any certification under the facts of this case; that it is inconsistent with the prosecution of the war effort and the war itself to certify this Union, or any other union, as the bargaining agency of Plant Protection men.

"Without waiving any of the positions we have thus far taken, the Company takes the further position that even if these Plant Protection men are employees within the Act, the International Union, of which Local 114 is a part, is under written contract with the Company, in which contract the International agrees that it will not accept for membership, or represent, Plant Protection men.

of the respondent engaged at its three Detroit plants, excluding the plant engineer, the assistant chief of plant protection, and all supervisory employees, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act. The undersigned further finds that on and at all times after July 3, 1943, the Union was the duly designated bargaining representative of a majority of the employees in the aforesaid appropriate unit, and that, pursuant to the provision of Section 9 (a) of the Act, the Union was on July 3, 1943, and at all times thereafter has been and is now the exclusive representative of all employees in the aforesaid unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

2. The refusal to bargain

Enclosed with a letter dated July 15, 1943, the Union sent the respondent a proposed contract and in the letter the Union requested the respondent to ". . . select a time and place for said contract to be negotiated." In reply

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"The Company further takes the position that it will not effectuate the policies of the Act to grant representation (or require bargaining) in this case.

"The Company further takes the position that the proposed unit here is not an appropriate unit, not an appropriate bargaining unit.

"Furthermore, the Company denies that there is a question affecting commerce involved."

The contract mentioned by the respondent's counsel in the above statement is a contract between the respondent and "International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations, and its Local No. 174," and contains the following clause:

> It is mutually agreed for the purpose of this agreement that the term "employee" shall not include foremen, assistant foremen, having the right to hire and fire, office timekeepers, time study men, clerical employees, plant protection employees or confidential salaried employees and that the Union will not solicit or accept the same for membership.

With respect to this contract, it is the undisputed evidence that although the contract is dated April 1, 1943, it was actually entered into at sometime after the hearing in the above mentioned representation proceeding, which was held on May 14, 1943.

The undersigned does not find any merit in the above contentions of the respondent.

to the Union's letter, the respondent sent the Union the following letter dated July 20, 1943:[3]

> Mr. Irving E. Griffeth
> Amalgamated Plant Protection
> Local No. 114, UAW-CIO
> 907 Hofmann Building
> 2539 Woodward Avenue
> Detroit, Michigan.
>
> Dear Sir:
>
> Answering yours of the 15th in which you ask that this Company negotiate a contract for its plant protection employees, please note that we do not care to so bargain until such time as a final decision is rendered on the various points which we raised at the hearing on the proposed certification.
>
> Very truly yours,
>
> FEDERAL MOTOR TRUCK COMPANY,
> (s) T. R. LIPPARD, *President.*

The undersigned finds that the respondent on July 20, 1943, and at all times thereafter, has refused to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit, and has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce, among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

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[3] At the hearing the respondent admitted that at sometime between July 16 and July 20, 1943, it had received a copy of the Board's certification, dated July 16, 1943.

V. The remedy

Since it has been found that the respondent has engaged in unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Since it has been found that the respondent has refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, it will be recommended that the respondent, upon request, bargain collectively with the Union.

Upon the basis of the above findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. Amalgamated Plant Protection Local No. 114, UAW-CIO is a labor organization, within the meaning of Section 2 (5) of the Act.

2. All plant-protection employees of the respondent engaged at its three Detroit plants, excluding the plant engineer, the assistant chief of plant protection, and all supervisory employees, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

3. Amalgamated Plant Protection Local No. 114, UAW-CIO was on July 3, 1943, and at all times thereafter, has been the exclusive representative of all employees in the aforesaid unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

4. By refusing on about July 20, 1943, and at all times thereafter, to bargain collectively with the Union as above stated as the exclusive representative of all its employees in the aforesaid appropriate unit, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is

engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that the respondent, Federal Motor Truck Company, and its officers, agents, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Amalgamated Plant Protection Local No. 114, UAW-CIO as the exclusive representative of all its plant protection employees engaged at its three Detroit plants, excluding the plant engineer, the assistant chief of plant protection and all supervisory employees;

(b) Engaging in any like or related act or conduct interfering with, restraining, or coercing its employees in the exercise of the rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Amalgamated Plant Protection Local No. 114, UAW-CIO as the exclusive representative of all of its employees in the aforesaid appropriate unit;

(b) Post immediately in conspicuous places at its plants in Detroit, Michigan, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is recom-

mended that it cease and desist in paragraph 1 (a) and (b) of these recommendations, and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of these recommendations;

(c) Notify the Regional Director for the Seventh Region in writing, within ten (10) days from the date of the receipt of this Intermediate Report, what steps the respondent has taken to comply herewith.

It is further recommended that unless on or before ten (10) days from the receipt of this Intermediate Report, the respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 2—as amended, effective October 19, 1943—any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington, D. C. an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement or exceptions and/or brief, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing within ten (10) days from the date of the order transferring the case to the Board.

JOHN H. EADIE, *Trial Examiner.*

Dated: November 23, 1943.

EXCEPTIONS OF THE FEDERAL MOTOR TRUCK COMPANY TO THE EXAMINER'S INTERMEDIATE REPORT

(Signed December 6, 1943)

Now comes Federal Motor Truck and excepts to the Intermediate Report in the following respects:

1.

In finding in lines 6 through 20, on page 4, that the plant protection employees (excluding the plant manager, the assistant chief of plant protection, and all supervisory employees) constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9 (b) of the Act, all of the facts and the law being to the contrary.

2.

In finding in lines 59 and 60, on page 4, that the contentions of the Company are without merit, all of the facts and the law being to the contrary.

3.

In finding in lines 1 to 6, inclusive, on page 5, that the Company has refused to bargain with an appropriate unit and that it has thus interfered with, restrained and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act, all of the facts and the law being to the contrary.

4.

In finding in lines 11 to 17, on page 5, inclusive, that the alleged activities of the Company have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce, all of the facts and the law being to the contrary.

5.

In finding in lines 20 through 28, on page 5, that the respondent has engaged in unfair labor practices and that it has refused to bargain with employees in an appropriate unit, all the facts and the law being to the contrary.

6.

By his conclusions of law as stated in lines 38 through 64, on page 5, all of the facts and the law being to the contrary.

7.

By recommending that the Company cease and desist as set forth in lines 10 through 51, on page 6, all of the facts and the law being to the contrary.

8.

By failing to find that the plant protection employees are a part of supervision and management and, therefore, the Company is not required to collectively bargain with any agency on their behalf.

9.

By failing to find that the employees here involved are militarized plant protection men and as such are not employees within the meaning of the Act.

10.

By failing to find that it would be contrary to public policy to include militarized plant protection men such as these men within the benefits of the Act.

11.

By failing to find that it is not within the legal discretion of the Board to issue a certificate under the facts of this case.

12.

By failing to find that it is inconsistent with the prosecution of the war effort to certify this union or any other union as the bargaining agency for plant protection men.

13.

Without waiving any of the foregoing, by failing to find that Local 114 is a part of the International Union, and that the International Union is and has been under written contracts with the Company, in which contracts it agrees that plant protection employees shall not be included with-

in a unit and that it will not solicit or accept plant protection employees for membership.

14.

Without waiving any of the foregoing, by failing to find that because of such contract provisions, the union has estopped itself from acting as the bargaining agency for plant protection employees.

15.

Without waiving any of the foregoing, by failing to find that because of the contract provisions, neither the union nor any of its locals should be designated as a bargaining agent for the plant protection employees.

16.

By failing to find that no part of the funds appropriated by the Labor-Federal Security Appropriations Act (Act of July 12, 1943, 78th Cong., c. 221, P. No. 135, Title IV) should be used in connection with this case because of the fact that there is an agreement between management and labor which at the time of the certification herein had been in existence for three months or longer, and a portion of which agreement the Examiner recommends be set aside. Therefore this case should be dismissed.

17.

Without waiving any of the foregoing, by recommending in lines 16 through 22, on page 6, that the employer be restrained from "engaging in any like or related act or conduct," etc., the same being too broad.

18.

Without waiving any of the foregoing, by not confining the proposed cease and desist order to the employees involved in this case, rather than all the employees in the plant.

19.

By requiring in lines 32 through 39, on page 6, that the employer post in conspicuous places at its plant

rather than confining the posting to the assembly room of the employees here involved.

Respectfully submitted,

FEDERAL MOTOR TRUCK COMPANY,
By ALBERT E. MEDER,
Its Attorney.

BEAUMONT, SMITH & HARRIS,
Of Counsel.
11th Floor Ford Building,
Detroit, Michigan.
December 6, 1943.

DECISION AND ORDER

(Signed January 29, 1944)

In the matter of FEDERAL MOTOR TRUCK COMPANY and AMALGAMATED PLANT PROTECTION LOCAL UNION No. 114, UAW-CIO[1]	Case No. 7-C-1209

On November 23, 1943, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the respondent filed exceptions to the Intermediate Report and a supporting

[1] The Union's name in the representation case was "Amalgamated Plant Protection Local Union No. 114," but it is clear that the same organization is meant.

brief. No request for oral argument before the Board at Washington, D. C., was made by any of the parties. The Board has considered the rulings of the Trial Examiner made at the hearing, and finds that no prejudicial errors were committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the respondent's exceptions and brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the additions noted below:

1. The respondent concedes that the contentions, which it now urges as a defense to its refusal to bargain with the Union, are the same which it urged as a bar to an election in the representation case. The Trial Examiner rejected the contentions, in accordance with our determination in the representation case. We affirm the Trial Examiner's findings.

2. The respondent contends, in addition, that the Board is precluded from proceeding in this case because of the limitations imposed upon the Board by the National Labor Relations Board Appropriations Act, 1944.[2] In support of its position, the respondent contends that the charge in this case was filed more than three months after its execution of an agreement with the International Union, which was dated April 1, 1942, and provided, among other things, that plant-protection employees would not be accepted as members. However, the record shows that, at sometime during the period between May 14, 1943, and November 15, 1943, the respondent and the International signed a superseding agreement, which reenacted the aforementioned membership exclusion clause and made

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[2] Title IV, Act of July 12, 1943, P.L. 135, 78 Cong., 1st Sess. The Appropriations Act contains the following provisions:

> No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed. *Provided*, That, hereafter, notice of such agreement shall have been posted in the plant affected for said period of three months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by any interested persons.

material changes in other provisions of the preceding agreement. On the basis of the entire record we find that the 1943 agreement was intended by both contracting parties to be, and in fact was, a new agreement. Since charges were filed by the Union on July 24, 1943, the 1943 agreement was not in existence for 3 months or longer without complaint being filed, within the meaning of the 1944 Appropriations Act.[3]

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Federal Motor Truck Company, Detroit, Michigan, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with Amalgamated Plant Protection Local No. 114, U.A.W. -C.I.O., as the exclusive representative of all its plant protection employees at its three Detroit plants, excluding the plant engineer, the assistant chief of plant protection, and all supervisory employees, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Amalgamated Plant Protection Local No. 114, U.A.W. - C.I.O., as

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[3] *Matter of The Cleveland Pneumatic Tool Company*, 53 N.L.R.B., No. 262.

the exclusive representative of all its plant protection employees at its three Detroit plants, excluding the plant engineer, the assistant chief of plant protection, and all supervisory employees, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Post immediately in conspicuous places at its plants in Detroit, Michigan, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a) and (b) of this Order, and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of this Order;

(c) Notify the Regional Director for the Seventh Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

Signed at Washington, D. C., this 29th day of January, 1944.

HARRY A. MILLIS, *Chairman,*
JOHN M. HOUSTON, *Member,*
(SEAL) National Labor Relations Board.

MR. GERARD D. REILLY, dissenting:

The real question presented here arises out of the provision in the collective contract between the Union and the Company covering production and maintenance workers, in which the Union agreed that it would not solicit or accept for membership plant protection employees, *inter alia.*

In the *Packard* case[4] there was a similar provision in the contract, although the phraseology of the agreement was somewhat different. In that case a majority of the Board held that a union which had made such an undertaking was, nevertheless, entitled to an election in which it sought to act as the collective representative of one of the categories it had agreed not to organize. Since I dis-

[4] *Matter of Packard Motor Car Company,* 47 N.L.R.B., 932.

sented in that case, I feel constrained to disagree with the holding in the instant case. The opinion of the majority in the *Packard* case was that such a provision in a collective agreement was invalid, the theory being that it contravened those provisions of the Act giving employees freedom of choice in their selection of a bargaining representative.

To my mind, however, there is a real difference between an agreement under which employees give up rights guaranteed to them by the Act or by the Constitution, and an agreement pursuant to which a labor organization simply declines to act as a representative for particular groups. There is no doctrine that a labor organization, in order to be certified as a representative under this Act, has to be willing to represent every occupational category. On the contrary, we know and have recognized the practice among craft unions of restricting membership only to certain classes of employees. In elections for public office, voters are free to select anyone of their choice, but it has never been suggested that the famous pledge of General Sherman's, "If nominated I shall not accept; if elected I shall not serve," was contrary to public policy.

Since the proceedings in the representation case which gave rise to the instant proceeding make it clear that the Union was the moving party, the principle of estoppel is applicable here.

Signed at Washington, D. C., this 29th day of January, 1944.

GERARD D. REILLY,
National Labor Relations Board.

TRANSCRIPT OF TESTIMONY

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

SEVENTH REGION

1*

In the matter of

FEDERAL MOTOR TRUCK COMPANY
and
AMALGAMATED PLANT PROTECTION LOCAL No. 114, UAW-CIO

Case No. VII-C-1209

1332 National Bank Building
Detroit, Michigan
Monday, November 15, 1943.

Pursuant to Notice, the above-entitled matter came on for hearing at 10:00 A. M.

Before: JOHN H. EADIE, Trial Examiner.

APPEARANCES:

Max Rotenberg, Esq., 1332 National Bank Building, Detroit, Appearing for the National Labor Relations Board.

Beaumont, Smith and Harris, by *Albert E. Meder, Esq.*, 11th Floor Ford Building, Detroit, Michigan, Appearing for the Company.

Irving E. Griffeth, Esq., 907 Hofmann Building, Detroit, and *Maurice Sugar & N. L. Smokler*, by *N. L. Smokler, Esq.*, 3220 Barlum Tower, Detroit, Michigan, Appearing for the Petitioner.

2 (Original Index)

* Inset numbers appearing at outer edge of text indicate page numbers of original stenographic transcript of testimony.

PROCEEDINGS

3 Trial Examiner Eadie: The hearing will come to order.

This is a formal hearing before the National Labor Relations Board In the Matter of Federal Motor Truck Company, and Amalgamated Plant Protection Local No. 114, UAW-CIO, Case No. VII-C-1209.

The Trial Examiner appearing for the National Labor Relations Board is John H. Eadie.

Counsel will please state all appearances for the record.

Mr. Rotenberg: Max Rotenberg, 1332 National Bank Building, appearing for the National Labor Relations Board.

Mr. Smokler: Maurice Sugar and N. L. Smokler, appearing for Local 114, UAW-CIO.

Trial Examiner Eadie: And who else?

Mr. Griffeth: Irving Griffeth, appearing for Amalmated Plant Protection Local No. 114.

Mr. Meder: Beaumont, Smith, and Harris, by Albert E. Meder, for the Company.

Trial Examiner Eadie: The official reporter makes the only official transcript of these proceedings.

Citations in briefs or arguments based upon the record directed to the Trial Examiner or to the Board must cite the official transcript in all references to the record. The Board will not certify any transcript other than the official transcript for use in any court litigation.

It may become necessary to make corrections in the record during the hearing. If so, the party desiring
4 the corrections will submit the suggested corrections to the other party or parties in writing. When this has received their written approval it will be submitted to the Trial Examiner. In the event the parties are unable to agree upon proposed corrections, the Trial Examiner will then consider motions to correct the record, or may, upon his own motion, order certain corrections made. If the parties have been unable to agree upon such corrections before the close of the hearing, but have entered into a stipulation concerning such matters after the close of the hearing, but before the transfer of the case to the

Board, such stipulations or motions should be addressed to the Trial Examiner in care of the Chief Trial Examiner in Washington. After the transfer of the case to the Board, all such communications should be directed to the Board itself, inasmuch as by such transfer to the Board, the Trial Examiner's connection with the case ceases.

Since this is a formal hearing, we shall maintain the dignity and decorum which usually accompanies judicial proceedings.

Concise statements of reasons for motions or objections will be permitted, but the Trial Examiner may go off the record for the purpose of hearing extended argument. Off-the-record discussion or argument will not be included in the official transcript unless an order to that effect be made by the Trial Examiner either upon the request of any of the parties or upon his own motion. All requests to go off the record are to be directed to the Trial Examiner, and not to the official reporter.

The Trial Examiner will allow an automatic exception to all adverse rulings and, upon appropriate order, an objection and exception will be permitted to stand to an entire line of questioning.

Five copies of all pleadings submitted during the hearing are to be filed with the Trial Examiner.

All exhibits offered in evidence shall be in duplicate.

At the close of the hearing, the Trial Examiner will request oral argument from the parties, and will feel free to discuss with and ask questions of the counsel or representatives of the parties with respect to their contentions as to the issues of fact and the legal principles involved. Oral argument at the close of the hearing will be included in the stenographic report.

Any party shall be entitled upon request made before the close of the hearing to file a brief with the Trial Examiner. Such briefs must be filed within five days from the close of the hearing.

Five copies of such briefs shall be directed to the Trial Examiner, in care of the Chief Trial Examiner in Washington.

Mr. Rotenberg, are you ready to proceed?

Mr. Rotenberg: Yes.

6 (Documents were marked for identification Board's Exhibits Nos. 1-A, 1-B, 1-C, No. 2, No. 3-A, and No. 3-B.)

Mr. Rotenberg: I now offer in evidence several documents marked for identification as follows:

Board's Exhibit 1-A, the original Complaint and the Charge filed by Amalgamated Plant Protection Local No. 114, UAW-CIO, and the Notice of Hearing issued in this matter and served upon all parties;

Board's Exhibit 1-B, Affidavit as to Service of the Complaint and Notice of Hearing upon the parties, the affidavit being signed by Sylvia Shotzen, an employee of the National Labor Relations Board;

Board's Exhibit 1-C is the original Answer of the Federal Motor Truck Company, the Respondent herein;

Board's Exhibit 2, a written stipulation entered into by and between the Federal Motor Truck Company by its Attorneys of record, and Max Rotenberg, attorney for the National Labor Relations Board, concerning the business operations of the Company;

Board's Exhibit 3-A, a copy of the Board's Decision and Direction of Election in the Representation proceeding, involving the Respondent herein and the charging union herein, known on the Board's records as Case No. R-5356;

Board's Exhibit 3-B, a copy of the Board's certification of representatives in the case I just referred to,

7 namely, Case No. R-5356.

Let the record show I am now handing the aforementioned documents to counsel for their inspection.

Mr. Meder: No objection on the part of the Company.

Mr. Smokler: No objection on the part of the CIO.

Trial Examiner Eadie: You are offering them in evidence?

Mr. Rotenberg: Yes.

Mr. Meder: It is your understanding that the entire file, including the transcript of the testimony in the Repre-

sentation case, under the Board's rules becomes a part of this case?

Trial Examiner Eadie: That is not my understanding.

Mr. Meder: That is not?

Mr. Rotenberg: We will take the matter up about the stipulation.

Trial Examiner Eadie: Do you want this off the record? Off the record.

(Discussion off the record.)

Trial Examiner Eadie: On the record.

You have an offer that has not been ruled upon. Is there any objection to Board's Exhibit No. 1 for identification?

Mr. Rotenberg: One through 3-B, inclusive, have been offered.

Trial Examiner Eadie: 1 through 3-B. Is there any objection to these exhibits?

8 Mr. Smokler: No objection on the part of the CIO.

Mr. Meder: None on the part of the Company.

Trial Examiner Eadie: They will be received.

(The documents heretofore marked for identification, Board's Exhibits 1-A, 1-B, 1-C, No. 2, 3-A, and 3-B, were received in evidence.)

Mr. Rotenberg: Will you mark this, please?

(The document referred to was marked for identification Board's Exhibit 4-A.)

Mr. Rotenberg: I now offer in evidence Board's Exhibit 4-A, a copy of a letter addressed to Federal Motor Truck Company, Detroit, Michigan, Attention: J. D. Porter, dated July 15, 1943, signed by Irving E. Griffeth, President Amalgamated Plant Protection Local 114, UAW-CIO.

Trial Examiner Eadie: Is there any objection?

Mr. Meder: No objection on the part of the Company.

Mr. Smokler: No objection.

Trial Examiner Eadie: It will be received.

(The document heretofore marked for identification Board's Exhibit 4-A was received in evidence.)

Mr. Rotenberg: Will you mark this, please?

(The document referred to was marked for identification Board's Exhibit 4-B.)

Mr. Rotenberg: I offer in evidence Board's Exhibit 4-B, a copy of the letter addressed to Mr. Irving E.
9 Griffeth, Amalgamated Plant Protection, Local No. 114, UAW-CIO, Detroit, Michigan, dated July 20, 1943, signed by Federal Motor Truck Company, by T. R. Lippard, President.

Mr. Meder: No objection on the part of the Company.

Mr. Smokler: No objection.

Trial Examiner Eadie: It will be received.

(The document heretofore marked for identification Board's Exhibit 4-B, was received in evidence.)

Mr. Rotenberg: Counsel, I will ask you, is it stipulated by and between the Company and counsel for the Board that Amalgamated Plant Protection, Local No. 114, UAW-CIO, is a labor organization within the meaning of the Act?

Mr. Meder: Yes.

Trial Examiner Eadie: Off the record.

(Discussion off the record.)

Trial Examiner Eadie: On the record.

Mr. Rotenberg: Is it further stipulated that the Respondent Company in the instant proceeding is the same company that was involved in the Representation proceeding, identified on the Board's records as R-5356?

Mr. Meder: Yes.

Mr. Rotenberg: And that the charging union in the instant proceeding is the same union that was involved in the Representation proceeding, I just referred to?

Mr. Meder: Yes.

10 Mr. Rotenberg: And is it further stipulated that the pleading and the record, including the transcript of the testimony and proceedings had in the Representation case involving this Respondent and this charging Union, identified on the Board's record as Case R-5356, be made a part of the record and proceedings herein?

Mr. Meder: May we go off the record?

Trial Examiner Eadie: Off the record.

(Discussion off the record.)

Trial Examiner Eadie: On the record.

Mr. Meder: Yes, I so stipulate.

Mr. Rotenberg: The transcript of the testimony I just referred to is identified at the Regional Director's office as VII-R-1409. Does the charging union join in this stipulation?

Mr. Smokler: Yes.

Trial Examiner Eadie: Just a moment. Will you read that stipulation, please?

(Last stipulation read.)

Trial Examiner Eadie: What is the purpose of that stipulation?

Mr. Rotenberg: It was my understanding that the record and the proceedings in the "R" case, in the event of a petition for enforcement, would be made a part of the entire record by reason of the provisions of the
11 Act, and in order to avoid any misunderstanding, we proposed to make that offer so that all parties would so understand.

Trial Examiner Eadie: Now, as I understand it, there was a request by the Union to the Company, and the Company, or the Respondent, refused that request as shown by the two letters that you have offered in evidence, is that right?

Mr. Rotenberg: That is correct.

Trial Examiner Eadie: Now, what are the contentions of the Respondent?

Mr. Meder: The contentions of the Respondent here are the same as the contentions of the Respondent in the Representation case. Do you care to have them repeated?

Trial Examiner Eadie: Yes, if you do not mind.

Mr. Meder: I am now reading from the record in the Representation case:—

Trial Examiner Eadie Interposing): Now, as I understand it, you are going to set forth the contentions of the Respondent; there is a refusal to bargain so far in this record.

Mr. Meder: That is right.

Trial Examiner Eadie: And, as a defense, you are going to set forth your contentions now on the record?

Mr. Meder: That is correct, sir.

"The position of the Federal Motor Truck Company is, in the first place, that the Plant Protection men are
12 a part of the supervision, part of management. Therefore, the Company should not be required under the Act to recognize the bargaining agency for them; that the men here involved are militarized Plant Protection men, and as such, in this case, are not employees within the meaning of the Act; that it would be contrary to public policy to include militarized Plant Protection men such as these men, within the Act; that it is not within the legal discretion of the Board to issue any certification under the facts of this case; that it is inconsistent with the prosecution of the war effort and the war itself to certify this Union, or any other union, as the bargaining agency of Plant Protection men.

"Without waiving any of the positions we have thus far taken, the Company takes the further position that even if these Plant Protection men are employees within the Act, the International Union, of which Local 114 is a part, is under written contract with the Company, in which contract the International agrees that it will not accept for membership, or represent, Plant Protection men.

"The Company further takes the position that it will not effectuate the policies of the Act to grant representation (or require bargaining) in this case.

"The Company further takes the position that the proposed unit here is not an appropriate unit, not an
13 appropriate bargaining unit.

"Furthermore, the Company denies that there is a question affecting commerce involved."

Trial Examiner Eadie: Now, Mr. Rotenberg, as I understand it, that stipulation covered merely the transcript of the record in the "R" proceeding, is that not right?

Mr. Rotenberg: It covers the pleading and the record and the proceedings in the "R" case.

Trial Examiner Eadie: I think it would be better, instead of doing that by stipulation, to make that an exhibit.

Mr. Rotenberg: We can do that.

Mr. Meder: Off the record?

Trial Examiner Eadie: Off the record.

(Discussion off the record.)

Trial Examiner Eadie: On the record.

Now, then, as I understand it, it has been stipulated that the record in the "R" case is a part of this particular "C" case.

Mr. Meder: That is right.

Mr. Rotenberg: That is true. I now wish to state on the record that the Board in the instant proceeding is relying on the record in Case No. R-5356 for its position that the employees of this Respondent, referred to in Paragraph 4 of the Complaint in the instant proceeding, constitute an appropriate unit for collective bargaining.

14 Mr. Meder: That is correct, as far as the Company is concerned; the Company is relying on the transcript in that case, and such testimony as we will offer here today, or stipulations, for its defense.

Trial Examiner Eadie: Of course, the Board is also relying on the Board's certification in the "R" case?

Mr. Rotenberg: That is true.

Mr. Meder, does the Respondent admit that sometime between July 16, 1943, the date of the Board's certification in Case No. R-5356, and July 20, 1943, the date when the Company refused to bargain with the Union, that Respondent had received a copy of the Board's certification in Case No. R-5356?

Mr. Meder: Yes.

Trial Examiner Eadie: Off the record.

(Discussion off the record.)

Trial Examiner Eadie: On the record.

Mr. Rotenberg: The Board rests.

Mr. Meder: May we go off the record?

Trial Examiner Eadie: Off the record.

(Discussion off the record.)

Trial Examiner Eadie: On the record.

FORBES W. LUTTON,

a witness called by and on behalf of the Company, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

15 Q. (By Mr. Meder): Your name is Forbes W. Lutton?

A. Yes, sir.

Q. You are plant engineer at the Federal Motor Truck Company, Detroit, and as such, you are in charge of the watchmen, is that right?

A. That's right.

Q. You are the same witness who testified in this matter in May, 1943, in the Representation case?

A. Yes, sir.

Mr. Meder: Will you mark this, please?

(The document referred to was marked for identification Company's Exhibit 1.)

Q. (By Mr. Meder): I show you a document which, for the purpose of this case, has been marked as Company's Exhibit 1, and ask you if you know what it is?

A. Yes, sir.

Q. What is it?

A. It is an agreement between the Company and the CIO.

Q. Was that an agreement that was signed subsequent to the last hearing in this case?

A. That's right.

Mr. Meder: The Company offers in evidence Company's Exhibit 1—a paper marked for identification as Company's Exhibit 1, dated April 1, 1943, an Agreement between the Company and the International Union,
16 United Automobile, Aircraft and Agricultural Implement Workers of America, affiliated with the CIO, and its Local No. 174, and more especially offers it because of Section 2 of Article I, which reads:

"It is mutually agreed for the purpose of this agreement that the term "employee" shall not in-

clude foremen, assistant foremen, having the right to hire and fire, office timekeepers, time study men, clerical employees, plant protection employees or confidential salaried employees and that the Union will not solicit or accept the same for membership."

In the Representation case, there was introduced in evidence—

Trial Examiner Eadie (Interposing): Off the record a second.

(Discussion off the record.)

Trial Examiner Eadie: On the record.

Mr. Meder: What was my last statement there?

(Record read as follows:

"In the Representation case, there was introduced in evidence—")

Mr. Meder (Continuing): —as Company's Exhibit 3, and admitted in evidence, the contract which was then in force between the International Union, and Local No. 174.

Q. (By Mr. Meder): Now, Witness—

Trial Examiner Eadie (Interposing): Just a moment. You offered this in evidence?

17 Mr. Meder: Well, I am going back and ask him a few questions first.

Trial Examiner Eadie: All right.

Mr. Meder: I will withdraw the offer.

Q. (By Mr. Meder): At the last hearing, you identified the contract which was then in force, did you not?

A. Yes, sir.

Q. Now, has that contract expired and is this new contract in effect?

A. That's right.

Trial Examiner Eadie: Referring to the new contract—

Q. (By Mr. Meder): When I refer to the new contract, I am talking about Company's Exhibit 1, which you have just identified in this case, is that correct?

A. That is correct.

Q. The paper marked, for identification, Company's Exhibit 1, was it or was it not executed after you testified in the last case?

A. It was executed after I testified.

Q. After you testified; even though it is dated back to April 1, 1943?

A. Dated back to April 1.

Mr. Meder: The Company now offers in evidence the paper which has been marked Company's Exhibit 1.

Trial Examiner Eadie: In what way is it ma-
18 terial to the issue in this case?

Mr. Meder: It is material to the issue, particularly the language of Section 2, in which the International Union, of which the local involved in this particular case is a part, agrees that it will not solicit or accept for membership the plant protection employees. It comes under Mr. Riley's dissenting opinion in a number of these cases. In other words, our position is that the International Union has estopped itself from accepting these people into membership and from representing them for the purpose of collective bargaining.

Mr. Rotenberg: The Board objects to the introduction of Company's Exhibit 1 in evidence, for the reason that it is immaterial. The Board has, in numerous cases, rejected the contention now made by the Company.

Mr. Meder: It was admitted in evidence, Mr. Examiner, in the last proceedings by the chief attorney for the Regional Board here.

Trial Examiner Eadie: I am inclined to agree with counsel for the Board. However, I will overrule the objection and it will be received in evidence as Respondent's Exhibit No. 1.

(The document heretofore marked for identification Company's Exhibit No. 1 was received in evidence.)

Q. (By Mr. Meder): Witness, you testified, did you not, at the last hearing that all but one of your
19 plant protection force had been sworn in by the Army, and that one had not been sworn in because he was a new employee. Do you remember that?

A. Yes, sir.

Q. Has that individual been sworn in since then?

A. Yes, sir.

Q. Tell us whether or not all your auxiliary military police, or, rather, whether or not all your plant protection men have been sworn in and are auxiliary military police.

A. They all are.

Q. Now, aside from that fact, has there been any change in the conditions to which you testified in the May hearing?

A. No.

Q. You still have the three plants?

A. That's right.

Q. You have the same number of plant protection men in each of the three plants?

A. Yes.

Q. And you are still operating in the same way, is that correct?

A. That is correct.

Mr. Meder: That is all, Witness.

CROSS EXAMINATION

Q. (By Mr. Rotenberg): There has been no change in the conditions and the duties of employment of the plant protection employees of the Company since the time of the Board's certification in this matter, has there?

A. No.

Mr. Rotenberg: That is all.

Trial Examiner Eadie: Any further questions?

Mr. Smokler: No further questions on the part of the CIO.

Trial Examiner Eadie: You are excused.

(Witness excused.)

Mr. Meder: The company rests.

Mr. Rotenberg: I now move the Trial Examiner that the Board's pleading conform to the proof herein, in the event there are any discrepancies in names or dates.

Mr. Meder: No objection on the part of the Company, and the same motion on the part of the Company is made as to its Answer.

Trial Examiner Eadie: Both motions will be granted.

Do any of the parties wish to present oral argument?

Mr. Meder: No. The Company would like to file a written brief.

Mr. Rotenberg: The Board does not desire to submit any oral argument.

Trial Examiner Eadie: Does the Board wish to file a brief?

Mr. Rotenberg: No. I might say this, though, that in the event the brief of Respondent reveals any mat-
21 ter which might occasion an answer on our part, we would like to reserve that right.

Trial Examiner Eadie: Well, I will say this, that all briefs must be filed within five days from today. If you wish to file a brief, I will grant permission for you to file one. You must have it in in five days. That goes for the Respondent, also.

Mr. Meder: Off the record?

Trial Examiner Eadie: Off the record.

(Discussion off the record.)

Trial Examiner Eadie: On the record.

Does the Union wish to file a brief?

Mr. Smokler: Not at this point.

Trial Examiner Eadie: Is there anything further?

Mr. Rotenberg: Nothing further on the part of the Board.

Trial Examiner Eadie: All right. The hearing is closed.

(At 11:00 o'clock a. m, Monday, November 15, 1943, the hearing in the above-entitled matter was closed.)

BOARD'S EXHIBITS Nos. 3-A and 3-B CONTAINED IN THE PLEADINGS

BOARD'S EXHIBIT No. 4-A

COPY

July 15, 1943

Federal Motor Truck Company,
5780 Federal Avenue,
Detroit, Michigan.

Attention: J. D. Porter

Dear Sir:

Enclosed please find Local No. 114's contract proposals for your Plant Protection men.

Kindly select a time and place for said contract to be negotiated.

Thanking you, and hoping to receive an early reply, I remain

Very truly yours,

IRVING E. GRIFFETH, *President*
Amalgamated Plant Protection
Local No. 114, UAW-CIO.

BOARD'S EXHIBIT No. 4-B

COPY

July 20, 1943

Mr. Irving E. Griffeth
Amalgamated Plant Protection
Local No. 114, UAW-CIO
907 Hofmann Building
2539 Woodward Avenue
Detroit, Michigan.

Dear Sir:

Answering yours of the 15th in which you ask that this Company negotiate a contract for its plant protection employees, please note that we do not care to so bargain until such time as a final decision is rendered on the various points which we raised at the hearing on the proposed certification.

Very truly yours,

FEDERAL MOTOR TRUCK COMPANY

(s) T. R. LIPPARD, *President.*

RESPONDENT'S EXHIBIT No. 1

AGREEMENT

THIS AGREEMENT, entered into this 1st day of April, 1943, between FEDERAL MOTOR TRUCK COMPANY, of Detroit, Michigan (hereinafter referred to as the "COMPANY"), and the INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, Affiliated with the Congress of Industrial Organizations, and its LOCAL 174 (hereinafter referred to as the "UNION").

WITNESSETH, the parties hereto mutually agree as follows:

ARTICLE I.

RECOGNITION

SECTION 1. The Company recognizes International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 174, affiliated with the C. I. O., as the exclusive bargaining agency for all the factory employees of the Company excepting those included within the classes mentioned in the following Section of this Article, for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment or other conditions of employment, provided that any individual employee shall have the right at any time to present grievance to the Management.

SECTION 2. It is mutually agreed for the purpose of this Agreement that the term "employee" shall not include foremen, assistant foremen having the right to hire and fire, office timekeepers, time study men, clerical employees, plant protection employees or confidential salaried employees, and that the Union will not solicit or accept the same for membership.

* * * * * * * * *

ARTICLE VIII

DURATION

This Agreement shall become effective on the day and year first above written, and shall continue in full force and effect for a period of one (1) year, and shall continue thereafter in full force and effect from year to year un-

less notice of termination shall be given by either party thirty (30) days before the end of the year, or on any anniversary of that date. However, either party may give a thirty (30) day notice in writing of a desire to amend or modify any of the terms of the Agreement and a meeting to consider such proposal shall be had within ten (10) days. If an Agreement can be reached on such proposal, the contract will be so amended or modified.

FEDERAL MOTOR TRUCK COMPANY

By (Signed) T. R. LIPPARD
By (Signed) F. L. RUDDON
By (Signed) J. D. PORTER

INTERNATIONAL UNION, UNITED AUTOMOBILE AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C. I. O.

By (Signed) EDWARD J. COTE, *President*, West Side Local No. 174 UAW-CIO.

By (Signed) WILLIAM STEVENSON, *Director*, Region 1A, UAW-CIO.

SHOP COMMITTEE

FEDERAL MOTOR TRUCK DIVISION
WEST SIDE LOCAL 174, UAW-CIO

(Signed) EDWARD FALLIS
(Signed) JOSEPH W. BONNO
(Signed) J. E. POLLOCK
(Signed) HAROLD JOHNSON
(Signed) JAMES M. POYNTER
(Signed) WESTON WARREN
(Signed) GEORGE DEADMAN
(Signed) MORRIS B. HAYES
(Signed) WALTER H. JERRELL.

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5/14/43

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

v.

FEDERAL MOTOR TRUCK COMPANY

Cause argued and submitted

(October 16, 1944)

Before: HICKS, SIMONS, and ALLEN, Circuit Judges

This cause is argued by F. J. Donner for Petitioner, by Hal H. Smith for Respondent and by T. R. Iserman for Chrysler Corporation as amicus curiae, and is submitted to the court.

Judgment

(Entered December 8, 1944)

On petition for enforcement of an order of the National Labor Relations Board.

This cause came on to be heard on the transcript of record from the National Labor Relations Board, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this court that the petition for enforcement of the order of the said Board be and the same is hereby denied.

Opinion

(Filed December 8, 1944)

For copy of Opinion, see case No. 9730, NLRB v. Jones & Laughlin Steel Corp.

Petition for rehearing

(Filed January 8, 1945)

For copy of Petition for Rehearing, see case No. 9730, NLRB v. Jones & Laughlin Steel Corp.

Order denying petition for rehearing

(Entered February 6, 1945)

The Motion of United Steelworkers of America filed January 8, 1945, for leave to intervene and file a brief is granted; the brief of International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO) filed January 8, 1945, as amicus curiae, is allowed; and the petition to rehear filed by National Labor Relations Board January 8, 1945, is denied.

Order amending opinion

(Entered February 10, 1945)

It is ordered by the court that its opinion, filed in these causes on December 8, 1944, be and is hereby amended as follows: (1) by striking from the second sentence of the fourth full paragraph appearing on page 2 thereof the subsection designation "a" and by substituting therefor the numeral "2" so that the sentence as amended now reads, "Here the Board must give consideration to Sec. 2 (2) and (3)"; and (2) by striking from the first sentence of the third full paragraph on page 7 thereof, the section designation "2" and substituting therefor the numeral "9," so that the sentence as amended now reads, "The Board, under Sec. 9 (b) had a positive duty to perform in the interest of the public."

United States Circuit Court of Appeals for the Sixth Circuit

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of National Labor Relations Board v. Federal Motor Truck Company, No. 9769, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 10th day of April, A. D. 1945.

[SEAL]

J. W. MENZIES,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1945

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No. 9730

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FILED
MAY 5 1945
CHARLES ELMORE CROPLEY
CLERK

United States Circuit Court of Appeals

FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

JONES & LAUGHLIN STEEL CORPORATION,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board.

TRANSCRIPT OF RECORD

Original Transcript Filed February 1, 1944

LESLIE WHARTON, PUBLISHER, CINCINNATI, OHIO

FILED
MAR 28 1944

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CASE NO. R-5143

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

EIGHTH REGION

In the matter of JONES AND LAUGHLIN STEEL CORP., OTIS WORKS, and UNITED STEELWORKERS OF AMERICA (CIO).	Case No. VIII-R-1056

AMENDED PETITION FOR INVESTIGATION AND CERTIFICATION OF REPRESENTATIVES PURSUANT TO SECTION 9(c) OF THE NATIONAL LABOR RELATIONS ACT

(Filed March 15, 1943)

1. Name of employer—Jones and Laughlin Steel Corp., Otis Works.
2. Address—Jennings Road, Cleveland, Ohio.
3. General nature of business—Iron and steel manufacture.
4. Description of the bargaining unit which petitioner claims is appropriate—All patrolmen, watchmen & firemen, including "dump laborers" but excluding lieutenants, captains and other supervisors.
5. Approximate number of employees in such unit—60.
6. Approximate total number of employees in plant or plants involved—4700.
7. Number or percentage of employees in such unit who have designated or selected petitioner to be their representative for collective bargaining—42.

8. Who is the present bargaining representative of employees?

9. Names, addresses, and affiliation of any other known individuals or labor organizations who claim to represent any of the employees in such bargaining unit—None.

10. Is there an existing or recently expired contract and if so give expiration date?—None.

11. The undersigned hereby alleges that a question has arisen concerning the representation of the employees in the above bargaining unit, in that:

    Company refused to bargain until union is certified by the National Labor Relations Board.

    The undersigned further alleges that said question concerning representation is a question affecting commerce within the meaning of said act.

    The undersigned requests that pursuant to section 9 (*c*) of the National Labor Relations Act, the National Labor Relations Board investigate such controversy and certify to the parties the name or names of the representatives that have been designated or selected by said employees.

    Name and address of employees or representatives filing the petition. (If made by a labor organization, give also the full name, local number and affiliation of the organization and the name and official position of the person acting for the organization.)

    UNITED STEELWORKERS OF AMERICA (CIO),
    By: LEO E. CASEY,
    804 Chester Ninth Bldg.,
    Phone: Pr. 5690.

Subscribed and sworn to before me this 15th day of March, 1943 at Cleveland, Ohio.

(SEAL)

ARTHUR STARK, *Field Examiner,*
N.L.R.B., Eighth Region.

TRANSCRIPT OF TESTIMONY

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

EIGHTH REGION

1*

In the matter of JONES & LAUGHLIN STEEL CORPORATION, OTIS WORKS, and UNITED STEELWORKERS OF AMERICA, CIO.	Case No. VIII-R-1056

Room 213,
Public Square Building,
Cleveland, Ohio,
Thursday, April 8, 1943.

Pursuant to notice, the above-entitled matter came on for hearing at 10 a. m.

Before: LOUIS PLOST, Trial Examiner.

APPEARANCES:

Earl F. Blank, Director Personnel Relations, Pittsburgh, and,

F. W. Mumper, Personnel Department, Otis Works, appearing on behalf of the Company.

William F. Donovan, District Director, 804 Chester-Ninth Building, Cleveland, Ohio, appearing on behalf of the CIO.

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* Inset numbers appearing at outer edge of text indicate page numbers of original stenographic transcript of testimony.

PROCEEDINGS

• • • • • • • • • • •

6 Trial Examiner Plost: Do any of you gentlemen care to examine these documents before I offer them in evidence?

Mr. Blank: I believe we have received copies.

• • • • • • • • • • •

7 Trial Examiner Plost: I will direct the reporter to amend all Board documents as they may appear to show the Company's name as being "Jones & Laughlin Steel Corporation," with the word "corporation" spelled in full, "Otis Works".

At the same time, I will instruct the reporter to amend the caption of the case to show the correct designation of the Company.

I will now offer Board's Exhibit No. 1 in evidence. Is there any objection?

(No response.)

Let the record show there is no response. Board's Exhibit No. 1 is received in evidence.

(The document heretofore marked for identification as Board's Exhibit No. 1 was received in evidence.)

• • • • • • • • • • •

Trial Examiner Plost: • • • During our off the record discussion, we were able to arrive at various stipu-

8 lations, which I will now read into the record.

These stipulations will be by and among all the parties to the proceeding. When the phrase "all the parties" is used, it is to mean the Jones & Laughlin Steel Corporation and the United Steelworkers of America, CIO.

The first stipulation arrived at is a stipulation regarding the business and interstate commerce status of the Company. I will now read the stipulation into the record.

It is stipulated by and among the parties hereto that Jones & Laughlin Steel Corporation, Otis Works, is a corporation organized and existing by virtue of the laws of the State of Pennsylvania, and is registered to do busi-

ness in the State of Ohio, as well as other states of the Union.

9 The only plant of the Company affected by this proceeding and stipulation is the Company's Otis Works at Cleveland, Ohio, which works combine the Company's Lakeside and Riverside plants at Cleveland, Ohio.

At this Otis Works, the Company is engaged in the manufacture of steel and steel products in various forms. The principal raw materials used by the Company in the manufacture of these products are coal, iron ore and limestone.

During the year 1942, the raw materials used by the Company and the finished products manufactured by the Company at its Otis Works amounted, in each instance to more than $1,000,000.

More than 50 per cent of these materials and finished products came to the Company and were shipped and sold by the Company to points outside the State of Ohio.

At its Otis Works, the Company employs 72 plant protection employees; these employees are divided into the following categories: 58 patrolmen, 2 firemen, 2 dump laborers, 8 lieutenants, 2 captains.

The Company is engaged in production for the National War Effort.

The Company is engaged in commerce within the meaning of the National Labor Relations Act.

Do you so stipulate, Mr. Blank?

10 Mr. Blank: I would suggest, on those captains, that you call them "fire captains" because it might be confusing with the captain of the whole group.

Trial Examiner Plost: All right, let the reporter change the designation of two captains to read to fire captains.

Do you so stipulate, Mr. Blank?

Mr. Blank: Yes.

Trial Examiner Plost: Do you so stipulate, Mr. Donovan?

Mr. Donovan: Yes.

Trial Examiner Plost: The second stipulation arrived at is on the labor organization involved.

I will read the stipulation into the record.

It is stipulated by and among the parties hereto that the United Steelworkers of America, CIO, is a labor organization within the meaning of the National Labor Relations Act.

Do you so stipulate, Mr. Donovan?

Mr. Donovan: I do.

Trial Examiner Plost: Do you so stipulate, Mr. Blank?

Mr. Blank: Yes, sir.

Trial Examiner Plost: The third stipulation arrived at concerns the question of representation, which I will now read into the record.

11 It is stipulated by and among the parties hereto that on February 17, 1943, the representative of the United Steelworkers of America, CIO, informed the Company that they represented a majority of the employees within an appropriate unit, consisting of all patrolmen, watchmen and firemen, including the dump laborers, but excluding lieutenants, captains and supervisors employed at its Otis Works, and requested recognition as the bargaining agency.

The Company at that time refused to recognize the United Steel Workers of America, CIO, until it had been certified by the National Labor Relations Board.

Do you so stipulate, Mr. Blank?

Mr. Blank: I think that is substantially correct. I don't know about the date, but I don't think it is very important.

Trial Examiner Plost: For the purposes of the record, it will be sufficient?

Mr. Blank: I believe so.

Trial Examiner Plost: Do you so stipulate, Mr. Donovan?

Mr. Donovan: I do.

* * * * * * * * * *

Mr. Blank: I would like to read into the record, Mr. Examiner, a statement in connection with the Com-

12 pany's policy on the bargaining unit. I will furnish the Board with copies of this statement.

Trial Examiner Plost: You may read the statement into the record.

Mr. Blank: The Otis Works is owned and operated by

Jones & McLaughlin Steel Corporation of Pittsburgh, Pennsylvania. The Corporation, with its subsidiary companies, employs approximately 40,000 people of which 4,700 are employed at the Otis Works. The Otis Works consists of two plants known as the Riverside Plant, employing approximately 3,200 people; and the Lakeside plant, employing approximately 1,500 people. The Otis Works was formerly owned and operated by The Otis Steel Company and was acquired by Jones & Laughlin Steel Corporation by purchase at close of business on June 30, 1942.

At the time of this acquisition Jones & Laughlin Steel Corporation had a labor agreement with the Steel Workers Organizing Committee covering its plants at Pittsburgh, Aliquippa and McKeesport, Pennsylvania. The Otis Steel Company, while not having a formal written signed agreement with the Union, operated under a memorandum that served as a labor agreement, such memorandum having been effectuated through the United States Conciliation Service. On July 21, 1942, the United Steelworkers of America, successor to the Steel Workers Organizing Committee, served notice on the Jones & Laughlin Steel Corporation that it desired to terminate the labor agreement currently in effect, and on August 3, 1942 negotiations looking to the consummation of a new agreement were started. At the request of the Union, *the Otis Works was considered as being one of the units of the Jones & Laughlin Steel Corporation to be included in the new collective bargaining agreement—this notwithstanding the agreement to be entered into was an exclusive collective bargaining agreement and the Union had never been certified as the bargaining agency for employees of the former Otis Steel Company.*

13

The new agreement between the parties was consummated on December 11, 1942, to be effective as of December 11, 1942, to be effective as of December 2, 1942, and said contract is still in effect. Reference to Section 1 of this very recently consummated agreement indicates that it was and still is the intention of the parties thereto to provide for the economic and efficient operations of the plants

and the prevention of strikes and other disturbances which interfere with production, all of which should result in harmonious relationships between the Union and the Corporation.

The term "employe" in that agreement is defined as *excluding* foremen or Assistant Foremen in charge
14 of any classes of labor, *Watchmen*, Salaried Employees and Nurses.

These four groups occupy positions which by virtue of the character thereof necessarily render them perforce management representatives. It is evident from the above exclusions that the enumerated groups have interests so akin to that of the Corporation that it was, as late as December 11, 1942, the desire of both the Corporation and the Union to have these people serve management's interest without other affiliation.

It is the position of the Jones & Laughlin Steel Corporation in this case that the unionization of watchmen or guards is not appropriate at any time—certainly not at the present time in the midst of the War Program. Any allegation that same is in fact appropriate is, in our opinion, a direct contravention of the covenants of the existing labor agreement designed to effect higher managerial efficiency and the promotion of the War Effort.

It must be borne in mind that these guards are charged with the responsibility for the protection of the physical plant and equipment of the Corporation. It is their duty to keep intruders out, to see that the rules and regulations of the Corporation are maintained within the plant for the benefit of all concerned, to see that the peace is kept, and to act as conservators of the legal rights of the Corporation.

15 The duties of these guards do not differ greatly from the duties performed by members of a city, county or state police force. They do, however, have the additional responsibility of carrying out assignments of management which are very often of a confidential nature, and allegiance to management must be unquestioned.

Any thing which might tend to be destructive to the discipline normally manifested in a guard force can have

no other effect than weakening the plant protection system set up to effectively preserve and maintain industrial operations.

In addition, it must be realized that those guards are now and for some time past have been sworn in as Auxiliary Military Police, and, in this connection, are under the direct supervision and jurisdiction of the United States Army and are currently receiving instructions from officers of the United States Army.

We believe that no better explanation of the obligations and duties of these guards in respect to their military affiliation can be given than is set forth in the oath of allegiance which every guard must read and sign: viz.

"Agreement between the United States of America and John Doe (Plant Guard).

"In order that the existing military forces of the United States may be most effectively employed to com-
16 bat activity against the enemies of the United States, the United States is approving the employment of certain guards as a civilian auxiliary to the military police for the purpose of guarding and protecting war material, war premises and war utilities from injury or destruction by the enemy or otherwise, including the making of arrests, as peace officers for violations of Federal laws, as well as for violation of orders and regulations issued by military authority. The United States requests that only persons physically fit, well trained in the use of arms and in the duties incident to their position, and of unquestionable loyalty to the United States be so employed.

"Now, therefore, I, John Doe, who have been or am about to be employed by Jones & Laughlin Steel Corporation, Pittsburgh, Pa. as a guard at Otis Works for the purpose of guarding certain war material, war premises, and war utilities, in consideration of my employment or the continuation of my employment, do agree with the United States of America that:

"(1) I will support and defend the Constitution of the United States against all enemies, foreign and domestic;

"(2) I will bear true faith and allegiance to the Constitution of the United States:

17 "(3) I will well and faithfully discharge my duty as a civilian auxiliary to the military police to protect war material, war premises, and war utilities against all enemies, foreign and domestic, and will obey any orders issued in connection therewith by the President, as Commander-in-Chief of the Army and Navy of the United States, and by his duly authorized officers.

"(4) I acknowledge that the appropriate Articles of War have been read and explained to me, and that in the performance of my duty to protect such war material, war premises, and war utilities, I am subject to military law during the period of my employment.

....

(Date) (Signature of Plant Guard)

.....

(Witness—Commissioned Officer—U. S. Army)"

It is the position of this Corporation that the guards in question perform certain assigned work that is strictly representative of management, and for the reasons above assigned, it is respectfully requested that this petition be dismissed.

18 Trial Examiner Plost: As I understand you, you also at this time formally move to dismiss the Petition on the grounds that the unit of guards is not appropriate?

Mr. Blank: That's right.

Trial Examiner Plost: The ruling on the motion under the Rules and Regulations of the Board must be referred to the Board itself in Washington, and will be so referred.

* * * * * * * * * *

F. W. MUMPER

a witness called by and on behalf of the National Labor Relations Board, being first duly sworn, was examined and testified as follows:

EXAMINATION

Q. (By Trial Examiner Plost): State your name, your address and your connection with the Company, for the purposes of the record?

A. F. W. Mumper, Business address is the Otis Works, Jones & Laughlin Steel Corporation, Personnel Department.

Q. Mr. Mumper, you heard the reading of the stipulation regarding the commerce of the Company, in which the guard force was set out in more or less detail. There are 72 plant protection employees, is that correct,

19 approximately?

A. Approximately.

Q. 58 of whom are patrolmen is that correct?

A. That would be approximately right.

Q. Now, what are the duties of these patrolmen or guards, as you call them?

A. To protect the plant property, the employees of the Company and such other things of that nature that may be necessary.

Q. Are these men armed while they perform their duties? Do they carry weapons?

A. Frankly, I am not sure whether they do, now. I believe that they do.

Q. Do they wear uniforms?

A. Yes.

Q. Have all of these men taken the oath of an auxiliary policeman as given to them by the United States Army?

A. To the best of my knowledge, they have.

Q. Are they subject to the control of the United States Army officers, either stationed at the plant or in charge of the vicinity?

A. I have been informed that that is true.

Q. Do these men receive their pay from the Company or from the United States Army?

A. From the Company.

Q. Is the Company able to discharge these men, if they are not suitable?

A. So far as I know, they are.

Q. Does the Company consult with the officers of the United States Army before it discharges any of these men, if it does discharge any?

A. I haven't any personal knowledge of a discharge case since the Army has gone in. Now, whether the chief would consult with the Army in that respect, I wouldn't know.

Q. But your feeling is, your knowledge is that these men are what is commonly called "auxiliary military police" and in the Otis Works of the Company are controlled, handled, paid and in every other way treated as auxiliary military police are treated in other plants?

A. Not being familiar with how military police are treated in other plants, I am afraid I couldn't answer the question.

Q. By that I mean, are these men to your knowledge sworn as auxiliary military police, subject to the control of the Army?

A. Yes.

Q. And their sole duty is the protection of the plant property in addition to their regular duties as plant protection, consideration the fact that the plant is a war production plant?

A. That's right.

Q. Now, in this category of employees, we have two firemen. Do you know what the duties of these firemen are?

A. Yes, sir.

Q. Will you state them, please?

A. Throughout the plant we have fire equipment, hose and fire equipment, wagons; these two firemen, one located at the Lakeside Works and one ot our Riverside Works, have the job of keeping this equipment in as thorough—in condition; the extinguishers filled, the hose in good shape and so on and so forth.

Q. Now, in this category of employees, there are also

two dump laborers; do you know what their duties are?

A. Yes.

Q. Will you tell us what they are, please?

A. We have a section of the plant where refuse from the plant is dumped; this section is somewhat isolated. At one time, they maintained patrol service there. Then, it was decided that that was not necessary and we put laborers on at this dump and they recover the scrap from the slag, and the refuse that is dumped over there, and pile it up, and at the same time they are theoretically watching that section of the plant. They are really in no sense watchmen, but they have been inherited by the police department by reason of that connection that they are just simply under the police department.

22 Q. Do they receive their orders from the police department?

A. That's right.

Q. The police department tells them when to go to work and what to do, and all those things?

A. Yes, sir.

Q. Now, I notice that in this category there are eight lieutenants and two captains. Are these the lieutenants and the captains who have control of and issue orders to the patrolmen, the firemen, and the dump laborers that we have been speaking about?

A. The two captains are the two men who are in charge of the fire equipment, one being at Riverside and one at Lakeside.

Q. Then the two fire captains are the same people as are also called the two firemen, is that right?

A. Except that they are supervisors?

Q. They are supervisors?

A. Yes.

Q. And the lieutenants are in charge of the police, is that correct?

A. That's right.

Q. Now, is there someone in charge of this whole set up other than the ones we have listed here in the stipulation?

A. Yes, we have a chief or plant warden.

Q. Do his duties include other duties than look-
23 ing after these men? Does the plant warden have other duties than the control of police and fire departments?

A. I would say that is at least his major duty.

Q. His major duties?

A. Yes, he may be used for other purposes, but that would be his major duty.

Trial Examiner Plost: That is all, thank you very much.

I would like to, Mr. Examiner, help a little bit with the questions which you asked Mr. Mumper in connection with the discharge of guards, and the relations to the military police, and I would like to read a couple of paragraphs from the Articles of War, which I think would answer that somewhat.

Trial Examiner Plost: If you will just read them into the record, we will have them there and it will be very helpful.

Mr. Blank: I don't think that there is any question at all that our police captain could discharge any of these people that have been sworn in as United States Army Auxiliary Police without first having the sanction of the head of the military police in his district, for this reason, and I am quoting from Article 28 of the Articles of War:

"Any person subject to military law who quits his
24 organization or place of duty with the intent to avoid hazardous duty to to shirk important service, shall be deemed a deserter."

And also Article 58, on desertion: "Any person subject to military law who deserts or attempts to desert the service of the United States, shall, if the offense be committed in time of war, suffer death or other punishment as a court martial may direct, and if the offense be committed at any other time, such punishment excepting death that a court martial may direct."

In other words, unless the head of the military police knew that this man was being relieved of duty, they might pick him up as a deserter, so I think it would be very important that that man be dropped through the regular personnel records of the military police.

Trial Examiner Plost: Is there anything else you want to state to clarify this situation as to the guards?

Mr. Blank: I might read a couple of other articles from the Articles of War, just to emphasize the discipline that is necessary in handling the military police situation, and the responsibilities that are placed upon these men, not only as representatives of management, as we feel, but as representatives of the United States Army.

Article 62 reads: "Disrespect towards superior officer; any person subject to military law who behaves himself with disrespect towards his superior officer shall be punished as a court martial may direct."

And Article 66: "Any person subject to military law who attempts to create or who begins, incite, causes, or joins in any mutiny or sedition in any company, party, post, camp, detachment, guard or other command, shall suffer death or such other punishment as the court martial may direct."

And Article 67: "Failure to suppress mutiny or sedition; any officer or soldier who, being present at any mutiny, or sedition, does not use his utmost endeavor to suppress the same, or knowing or having reason to believe that a mutiny or sedition is to take place, does not without delay give information thereof to his commanding officer, shall suffer death or such other punishment as a court martial may direct."

I would like also to put in the record—I can't do it verbatim, but I can pretty much repeat, at least in principal, testimony of Mr. Joseph Larken, Vice President of the Bethlehem Steel Corporation, before the House Military Affairs Committee last Thursday, when discussing the question of the unionization of foremen: he made the statement that at one of their plants, the guards had been unionized, and told of one instance where a guard found a union member asleep, belonging to the same organization and wanting to do his duty, at least so far as his responsibility to the Union was concerned, instead of reporting this man for sleeping, he called up the head of the union and asked him what he should do. The head of the union told him to forget about it.

Which was done. Later, it came out that this had occurred.

I just answer that, and the Board can get the transcript for the exact wording of the testimony from the House Military Affairs Committee, to show what the implications of guards belonging to the same union as rank and file workmen might mean to discipline in a plant.

That is all I have at this time.

Trial Examiner Plost: You made that last statement without the objection on the part of the Union; I merely wish to state that it is not appropriate at this time, and I will let it stand, however; you wouldn't care to cite the incident by page and number of the Congressional Record, and introduce the record? That would be the proper way to do this, but inasmuch as you have already made the statement without objection, I will leave it stand.

Mr. Donovan: Well, I want to enter an objection there, Mr. Examiner, to that last statement, because it is irrelevent and has no bearing whatsoever on this case of ours here.

If I may, for the record.

Mr. Blank: I believe I may be able to furnish
27 you with the transcript, or at least a portion of it and the page number. It wasn't available yesterday.

Trial Examiner Plost: Of course, you cannot do it at this time, but if you were to file a brief, it might be appropriate at that time.

Your objection will be sustained, Mr. Donovan, and I will direct that the statement made by Mr. Blank, beginning with the story of the plant guard having found a man asleep be physically expunged from the record—be stricken from the record and physically expunged from the record, except insofar as the right to cite the incident by page number in a transcript later to be used is reserved to the party.

Mr. Donovan, I understand that your Union has a contract with the Company covering certain employees of the Otis Works?

Mr. Donovan: We do.

Trial Examiner Plost: Are you at this time prepared to introduce such a contract into evidence?

Mr. Donovan: I am.

Trial Examiner Plost: Off the record.

(Discussion off the record.)

Trial Examiner Plost: On the record. Let the record show Mr. Donovan, the representative of the Union, offers in evidence an agreement between Jones & Laughlin Corporation and the United Steelworkers of America,
28 CIO, dated December 2, 1942. Will the reporter please mark it?

(The document above referred to was marked for identification as CIO'S Exhibit No. 1.)

Trial Examiner Plost: This document is marked by the reporter for identification as CIO Exhibit No. 1, and is a printed booklet, with printed signatures, and does not purport to be the original. I will ask the Company if it has any objection to receiving this in evidence, inasmuch as it is not an original; if the Company has knowledge that this is a true copy, we may receive it.

Mr. Blank: There is no objection, and we will certify that is a copy of the original.

Trial Examiner Plost: CIO Exhibit No. 1 is received in evidence.

(The document heretofore marked for identification as CIO'S Exhibit No. 1 was received in evidence.)

Trial Examiner Plost: Mr. Donovan, in this agreement, which covers the Company's Otis Works, do you specifically omit plant protection employees from the category?

Mr. Donovan: From this contract, we do. But we do feel, Mr. Examiner, that there is nothing to prevent us from going ahead with organizing this group of people and bargaining for them separately.

Not under this contract; we—I might say, for
29 your information, that in a contract that we have with the United States Steel Corporation, the white-collar workers were eliminated. But even though that were the case, we went right ahead and organized the white-collar workers, and the National Tube Company,

Lorain, Ellwood City, and McKeesport signed a separate contract for that group.

Trial Examiner Plost: Off the record.

(Discussion off the record.)

Trial Examiner Plost: On the record. Mr. Mumper, will you please take the stand again.

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EXAMINATION

Q. (By Trial Examiner Plost: Mr. Mumper, you are the famous Mumper that testified a few moments ago in this proceeding regarding the guards?

A. Yes, sir.

Q. I will ask you if these guards, plant protection employees, meaning the guards and the firemen, and these two dump laborers, are carried on the Company's payroll?

A. Yes, sir.

Q. How are they paid, on an hourly basis or on a monthly basis?

30 A. They are paid on an hourly rate of pay, payable every other Friday.

Q. Do they draw their pay at the same time other employees draw their pay?

A. They do.

Q. Is their pay set up and calculated and carried through the same payroll department as it is carried—that takes care of the other employees?

A. It is.

Trial Examiner Plost: Off the record.

(Discussion off the record.)

Trial Examiner Plost: On the record.

Q. (By Trial Examiner Plost): Are these employees subject to the same group benefit arrangements that are applied to other employees of the Company?

A. They are.

Trial Examiner Plost: That is all. Do you have any questions you care to ask Mr. Mumper, Mr. Donovan?

Mr. Donovan: No, I have no further questions I would

like to ask Mr. Mumper, no. But I would like to make a statement, if I may, for the record.

Trial Examiner Plost: You are excused, Mr. Mumper.

• • • • • • • • • • •

Trial Examiner Plost: Make your statement, Mr. Donovan.

31 Mr. Donovan: That I think that owing to the fact that we are just organizing or have organized the patrolmen and they still have a captain and about eight lieutenants, I think the situation is well in hand out there, so far as supervision is concerned over their group, just as it is with the production workers and maintenance workers.

They also have ample supervision over them, and I cannot agree with Mr. Blank that if these people are permitted to belong to our Union and we are permitted to bargain for them, it is going to break down the morale of that group, because I think it is going to strengthen the morale, if anything, because after all when we are permitted to bargain for those people, we have got certain responsibilities to assume in connection with it. We will not hesitate to assume our proper responsibilities when they are under our wing.

We have in the case of the production workers and maintenance workers, and I believe the record speaks for itself, and we will assume that same responsibility for this group. That is all.

Trial Examiner Plost: Gentlemen, there has been filed and is part of Board's Exhibit No. 1, a statement of a field examiner concerning the claims of authorization for representation.

32 No further evidence regarding the claims of authorization for the purpose of representation is needed, as the statement of the field examiner is deemed by the Board to be sufficient for all purposes.

I will ask the Company if it contemplates any material change in the number of guards or plant protection employees, firemen and so forth, within the next 30 or 60 days. Any material change?

Mr. Mumper: We should increase our force. We are

unable to do so. The Army is after us all the time, but we have had those orders for quite some time and we have not been able to materially change the number of people.

I doubt if there is any practical difference now from what it was when those figures were submitted. The men are not available.

Trial Examiner Plost: And probably will not be within the next 30 or 60 days?

Mr. Mumper: No.

Trial Examiner Plost: I will ask the Company, in the event the Board should order an election in this matter, whether the Company will cooperate with the Board in properly conducting the election, by furnishing us with the proper payrolls and the facilities for holding an election?

Mr. Blank: I am not prejudicing our position?

Trial Examiner Plost: Not at all.

Mr. Blank: But we always have—I can say that,
33 in the past, cooperated to the fullest extent in conducting NLRB elections.

Trial Examiner Plost: I wish to state that to the parties only in exceptional instances does the Board grant a request for oral argument before the Board itself.

I further wish to advise the parties that under Article 3, Section 9, of our Rules and Regulations, any party may file a brief with the Board within seven days after the close of the hearing, and I might state that if you find the time to be inadequate, the Board is very lenient in extending the additional time.

I will ask the parties to indicate at this time whether or not they care to file a brief, or whether, at least, they reserve the right to file a brief in this matter.

Mr. Donovan, do you care to file a brief?

Mr. Blank: I believe we would like to file a brief, inasmuch as the part of the testimony which I offered was deleted, and I think properly so.

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C. I. O. EXHIBIT No. 1

AGREEMENT

between

JONES & LAUGHLIN STEEL CORPORATION

and the

UNITED STEELWORKERS OF AMERICA, CIO

December 2, 1942

AGREEMENT

This Agreement, dated December 2, 1942, (hereinafter referred to as the "1942 Agreement") is between Jones & Laughlin Steel Corporation (hereinafter referred to as the "Corporation") and the United Steelworkers of America, or its successor (hereinafter referred to as the "Union") on behalf of all of the employes of the Corporation in its Pittsburgh, McKeesport, Otis and Aliquippa Works and at the Pittsburgh Warehouse.

Section 1

It is the intent and purpose of the parties hereto that this Agreement will promote economic and efficient operations of the plants, prevent strikes and other disturbances which interfere with production and thereby establish harmonious relationships between the Union and the Corporation by setting forth herein the basic Agreement covering rates of pay, hours of work and conditions of employment to be observed between the parties hereto.

The term "employe", as used in this Agreement, shall not include Foremen or Assistant Foremen in charge of any classes of labor, watchmen, salaried employes and nurses. A list of the occupations excluded by this Section will be provided the Union at each plant of the Corporation within sixty (60) days of the effective date of this Agreement. Any dispute in regard to such list may be subject to adjustment in accordance with the provisions of Section 7.

For the purposes of this Agreement, Foremen and As-

sistant Foremen shall be those who qualify for exemption under the provisions of the Fair Labor Standards Act as specified in the Administrator's Interpretative Bulletin effective October 24, 1940 and further provided that it shall not be the policy of the Corporation to have Foremen or Assistant Foremen displace employes.

SECTION 2—RECOGNITION

A. The Corporation recognizes the Union as the exclusive collective bargaining agency for all of its employes, except those holding positions on the excluded list referred to in Section 1. The Corporation recognizes and will not interfere with the right of its employes to become members of the Union. There shall be no discrimination, interference, restraint or coercion by the Corporation or any of its agents against any members because of membership in the Union. The Union, its members and agents, agrees not to intimidate or corce employes into membership and also not to solicit membership on Corporation time or plant property.

B. In accordance with the Directive Order of the National War Labor Board in Case No. 485, dated November 30, 1942, the following provisions are included in this Agreement:

> "In order to secure the increased production which will result from greater harmony between workers and employers and in the interest of increased cooperation between union and management, which cannot exist without a stable and responsible union, the parties hereto agree as follows:
>
> "All employees who, 15 days after the date of the Directive Order of the National War Labor Board in this case are members of the union in good standing in accordance with the constitution and bylaws of the union, and those employees who may thereafter become members shall, during the life of the agreement as a condition of employment, remain members of the union in good standing.

C. I. O. Exhibit No. 1

"The Company, for said employees, shall deduct from the first pay of each month the union dues for the preceding month of one dollar ($1.00)* and promptly remit the same to the International Secretary-Treasurer of the union. The initiation fee of the union of three dollars ($3.00) shall be deducted by the Company and remitted to the International Secretary-Treasurer of the Union in the same manner as dues collections.

"The Union shall promptly furnish to the National War Labor Board and to the company a notarized list of members in good standing 15 days after the date of the Directive Order. If any employee named on that list asserts that he withdrew from membership in the union prior to that date and any dispute arises, the assertion or dispute shall be adjudicated by an arbiter appointed by the National War Labor Board whose decision shall be final and binding upon the union and the employee.

"The Union agrees that neither it nor any of its officers or members will intimidate or corce employees into membership in the union. If any dispute arises (as to whether there has been any violation of this pledge or whether any employee affected by this clause has been deprived of good standing in any way contrary to the constitution and bylaws of the union) the dispute shall be regarded as a grievance and submitted to the grievance machinery and, if necessary, to the final determination of an arbitrator appointed by the National War Labor Board in the event that the collective-bargaining agreement does not provide for arbitration."

The Union shall indemnify, defend and save the Corporation harmless against any and all claims, demands, suits or other form of liability that shall arise out of or

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*At the Otis Works the monthly dues shall be one dollar and twenty-five cents ($1.25) when and if so approved by the National War Labor Board.

by reason of action taken or not taken by the Corporation in reliance upon certified lists furnished it by the Union or for the purpose of complying with any of the provisions of this Section.

SECTION 3—WAGES

Effective February 15, 1942, there shall be an increase in wages of five and one-half cents (5½c) per hour which will make the new common labor rate 78c per hour or $6.24 per eight hour day.

The increase of five and one-half cents (5½c) per hour shall be paid in the same manner as the ten cents (10c) per hour increase of April 1, 1941; namely, by adding an additional five and one-half cents (5½c) per hour to the wage scale of March 31, 1941.

Rates now in effect and as increased as above provided, shall remain in effect for the duration of this Agreement, except as changed in accordance with the provisions of Section 11.

The Corporation agrees that, when so requested by the Union, it will eliminate Pay Period Pooling of earnings resulting from piecework or straight tonnage rates and substitute therefor daily computation of earnings which shall be not less than the guaranteed occupational hourly rate or seventy-eight cents (78c), whichever is the greater, multiplied by the number of hours worked by the employe on that day.

The above conversion shall be based upon the premise that the wage costs to the Corporation for each of the concerned occupations will not be substantially increased.

Trade apprentices in any plant of the Corporation shall receive not less than the minimum common labor rate for each hour worked during the first period of the trade apprentice training program.

Women employed to perform work on jobs heretofore performed by men shall receive the same pay for fully performing the same quantity and type of work. Any such jobs with respect to which either party may allege wage rate inequalities shall be subject to the provisions of Section 11.

C. I. O. Exhibit No. 1

SECTION 4—HOURS OF WORK

A. This Section is intended to provide a basis for calculating overtime and shall not be construed as a guarantee of hours of work per day or per week.

B. (1) The normal work day shall be any regularly scheduled consecutive twenty-four (24) hour period comprising eight (8) consecutive hours of work and sixteen (16) consecutive hours of rest except for such rest periods as may be provided in accordance with practices heretofore prevailing in the plants of the Corporation; and the normal work week shall be five (5) consecutive work days followed by two (2) consecutive rest days within seven (7) consecutive days. A week shall consist of any seven (7) consecutive days regularly used by the Corporation for the determination of the pay of employes.

(2) If in Management's opinion it is necessary to establish schedules departing from this intent, the grievance committee of the plant and the management of the plant may, at the request of either party, confer to determine whether, based upon the facts of the situation, mutually satisfactory modified schedules can be arranged. It is agreed by both parties that diligent effort on the part of Management should result in not less than 85 per cent of all employees being scheduled on the normal work week (including those working on agreed-to schedules) as stated above and Management further agrees to furnish the grievance committee in each plant evidence of its performance in this respect from time to time as may be desired by the grievance committee.

(3) When less than four (4) hours are worked in any one day, such time is to be disregarded in the calculation of premium time for sixth and seventh day. However, should the aggregate number of hours worked during the calendar week exceed forty (40), time and one-half will be paid for all excess hours over forty (40).

C. (1) Hours worked in excess of eight (8) consecutive working hours or in excess of a total of forty (40) in a work week, or days worked in excess of five (5) work days

within the work week shall be paid for at one and one-half times the normal rate of pay.

(2) Overtime payment shall be made on the basis of either daily or weekly overtime hours worked, but an employee shall not be paid both daily and weekly overtime for the same overtime hours worked.

D. Determination of the starting time of the daily and weekly work schedules shall be made by the Corporation and such schedules may be changed by the Corporation from time to time to suit varying conditions of the business; provided, however, that indiscriminate changes shall not be made, in such schedules and provided, further, that changes deemed necessary by the Corporation shall be made known to the plant representatives of the Union as far in advance of such changes as is possible.

E. Employes who are scheduled, and who report for work shall be paid, in the event no work for which they were scheduled is available, for two hours' work at the occupational rate of the occupation at which they were scheduled. At Management's discretion, the employes scheduled or notified to report may be assigned to other work for which they may be qualified in lieu of their being released. If an employe is assigned to a higher rated job, he shall be paid the higher rate. If an employe is assigned to work beyond the two hours, he shall be paid the occupational rate of the job to which assigned. In case an employe does not work the two hours but is paid for same, the two hours shall be considered allowed time and shall not be used in overtime calculation, but the fact that he is paid the two hours shall not prevent him from working a full forty (40) hour week at regular rates of pay.

F. Employes who are scheduled and report and actually begin work on the job for which scheduled at the start of a turn and through no fault of their own work less than four (4) hours, shall be paid for a minimum of four (4) hours at their occupational rate. If the employe works only a part of this four hours, the unworked part shall be considered as allowed time and shall not be included in overtime calculation.

G. The foregoing payments (E-F) shall be either at the regular or overtime rates depending upon whichever pertains in accordance with the provisions of this Section.

H. The provisions of subsection "E" and "F" will not apply in the event that strikes, stoppages in connection with labor disputes, fires, storms, floods, power or mechanical failures or other conditions over which the employer has no control, interfere with work being provided.

J. The scheduling practices now in effect at the various plants shall remain in effect.

(Note: It is agreed that nothing contained herein is intended to waive the rights of either the Corporation or the Union in respect to Presidential Executive Order No. 9240, or interpretations thereof by the United States Department of Labor, so long as such Order is in effect.)

SECTION 5—VACATIONS*

I. Purpose:

The purpose of this Plan is to promote good will by providing vacations with pay for wage earner employes in recognition of their regular and continuous service over a number of years, and to enable those employes who qualify to enjoy a period of rest.

II. Eligibility:

Each employe who, prior to July 1, 1943, and each succeeding calendar year during the continuance of this Agreement, has been continuously in the employ of the Corporation for three (3) or more years shall receive one (1) week's vacation with pay, and each employe who has been continuously in the employ of the Corporation for fifteen (15) or more years shall receive two (2) weeks' vacation with pay. It is agreed that the computation of length of continuous service shall be based on the Jones &

Note: *This vacation section does not apply to the Otis Works. At the Otis Works, the vacation plan in effect for 1942 by the Otis Steel Company shall remain in effect during the life of this Agreement.

Laughlin Steel Corporation Pension Fund Rules for service continuity for all service up to and including April 30, 1941, which service shall be the total accumulated service as of that date and as provided under the Pension Fund Rules referred to above. Effective April 1, 1941, continuous service credit will be computed in accordance with Item III (Continuous Service) hereof. In addition to such service eligibility, each employe must have received earnings in at least sixty per cent (60%) of the pay periods between July 1, 1942 and July 1, 1943.

III. Continuous Service:

A. Continuous service shall be determined by the employe's first employment in any plant of the Corporation.

B. There shall be no deduction for any time lost which does not constitute a break in continuity of service.

C. Continuous service is broken by:

1. Voluntary quitting the service.

2. Termination due to discharge for cause, suspension or Leave of Absence, any of which continues for more than six (6) months.

3. Absence due either to lay-off or to disability, or both, which continues for more than two (2) years; provided, however, that employes injured while on duty shall accumulate credit for continuous service until termination of the period for which statutory compensation is payable and further provided that the employe returns to work as soon as he is physically able to do so.

4. Failure of employees on lay-off due to level of operations to report to Employment Office within five (5) days of registered mail notice. Ten days' time will be provided for men living outside the district at the time.

5. New employes and those hired after a break in continuity of service will be regarded as probationary employes for the first ninety (90) days of their employment and will receive no continuous service credit

during such period. During this period of probationary employment, probationary employes may be laid off or discharged as exclusively determined by Management; provided, that this will not be used for purposes of discrimination because of membership in the Union. Probationary employes continued in the service of the Corporation subsequent to ninety (90) days from date of original hiring shall receive full continuous service credit from date of original hiring.

6. Absence due to sickness, if the employe does not periodically (every thirty (30) days) report his status to the Employment Department or have an excuse for not so reporting that is satisfactory to Management.

IV. Length of Vacations:

1. A one (1) week's vacation shall consist of seven (7) consecutive days and a two (2) weeks' vacation of fourteen (14) consecutive days.

2. One week's vacation must be taken in a continuous period but two weeks' vacation may, if the employe and Management agree, be divided into two periods of one week each.

V. Vacation Season:

1. The vacation season shall be from April 1 to December 31, and vacation shall be forfeited if not taken within that period unless the employe presents a grievance prior to December 15. Vacations will, so far as possible, be granted at times most desired by employes; but the final right to allotment of vacation period is exclusively reserved to the Corporation.

2. If, in the opinion of the Management, the Vacation Program would interfere with the attainment of desired production, at the option of the Corporation any eligible employe may be required to continue work and receive vacation pay in lieu of actual vacation from work. However, it is the intent that to the greatest degree possible, eligible employes shall receive the benefits of vacation from work.

C. I. O. Exhibit No. 1

VI. Vacation Wages—How Paid:

1. Vacation wages will be paid in advance.

2. Employes who do not receive their vacation wages at the time of taking vacations, or employes who are required to work in lieu of a vacation, shall be given their vacation allowance immediately preceding December 25, unless the employe requests payment at an earlier date.

VII. Number of Hours to Be Paid For:

Employes granted vacation shall be paid, per week, a minimum of forty (40) hours of wages and a maximum of forty-eight (48) hours of wages based on the average number of hours worked per week as indicated by the first two pays received in March.

VIII. Rate Per Hour:

1. Employes granted vacations will be paid at their average rate of earnings per hour as indicated by the first two pays received in March.

2. The average rate of earnings per hour is construed to mean the wage earner employe's rate per hour based on the number of hours paid for.

3. If re-hired employes are eligible for vacations due to previous service, the vacation pay will be calculated on the basis of their rate of pay during the last two pay periods in which they had earnings.

IX. Employes Entering Military Service:

1. Employes who enter military service and are eligible for vacation during the calendar year in which they enter such service shall receive the amount of their vacation pay as shown on the wage earners' vacation payroll, provided this payroll has been prepared. In the event they enter military service before the vacation payroll is prepared, they will receive vacation pay based on their average rate of earnings per hour during the two pay periods closed and calculated prior to their date of leaving the service of the Corporation.

2. Employes who enter military service shall be con-

sidered as complying with the ruling that they must have worked in sixty per cent (60%) of the pay periods between July 1, 1942 and July 1, 1943, if they have received earnings in 60% of the pay periods between July 1, 1942 and the date ordered to report for induction.

3. Employes who volunteer for military service while on an occupational deferment granted by their draft board, shall not be granted their vacation allowance.

X. General Regulations:

1. Vacations shall be arranged in advance and an employe shall not be permitted to trade his vacation privilege for an unauthorized absence taken in advance of the vacation period assigned him.

2. A vacation may be re-scheduled for another date, or granted in case of sickness or other physical disability, but no time allowance will be made for sickness or other incapacity occurring during the vacation.

3. Employes who voluntarily quit their employment shall not be entitled to vacation allowance.

SECTION 6—SENIORITY

It is understood and agreed that in all cases of promotion or increase of forces, length of continuous service shall prevail only if ability to perform the work is relatively equal. In cases of demotion and decrease of forces, length of continuous service shall prevail unless an involved employe is possessed of exceptional ability that should be given additional consideration.

Determination of plant units to which the above factors shall be applied shall be on a job and departmental basis and the details of same shall be worked out by agreement between the plant Management and the grievance committee at each plant with the proviso that the present practice at the several plants shall be continued. The rules governing "Continuity of Service" as specified in Section 5 hereof shall be followed in determining continuous service.

When an employe is reprimanded or suspended, he shall be given a copy of the Suspension Reprimand Notice and

another copy will be placed in his permanent employment record.

Employes desiring a transfer from one department to another or one plant to another shall arrange same through their respective employment offices and practices governing same shall continue as now in effect.

Leaves of Absence, when granted, shall be at the sole discretion of Management and the usual duration of a Leave shall be for thirty (30) days, renewable on application and for just cause in thirty (30) day periods to a maximum of 180 days.

In decrease of forces, due to depression, and after the passage of two pay periods, or more as may be mutually agreed upon between plant Management and the Union, probationary employes will be removed before regular employes have their normal work week reduced. Thereafter work will be shared until the remaining employes are averaging, for two pay periods, less than three (3) days per week, at which time forces will be further reduced. This rule shall constitute a general standard, variations of which may be worked out as mutually agreed upon by plant Management and the Union.

Lines of natural job progression now in effect in the various plants shall be continued and every reasonable effort shall be made to mutually agree on same in places where they do not now exist.

The seniority standings of employes in a given department shall be kept on file in that department.

Section 7—Adjustment of Grievances

Should any difference arise between the Corporation and the Union or any employe of the Corporation as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise in any plant, there shall be no suspension of work on account of such differences but an earnest effort shall be made to settle such differences immediately in the following manner:

First, between the employe, with or without his grievance committeeman or assistant grievance com-

mitteeman present, and the foreman of the department involved;

Second, between a member or members of the grievance committee, designated by the Union and the superintendent of the department;

Third, between a member or members of the general grievance committee, designated by the Union, and the General Superintendent or his designated representative;

Fourth, between the representatives of the National Organization of the Union and the representatives of the executives of the Corporation; and

Fifth, in the event the dispute shall not have been satisfactorily settled, the matter shall then be appealed to an impartial umpire to be appointed by mutual agreement of the parties hereto. The decision of the umpire shall be final. The expense and salary incident to the services of the umpire shall be paid jointly by the Corporation and the Union.

The above procedure shall be available to either the Corporation or the Union.

It is the purpose of this Section to provide procedure for prompt, equitable adjustments of alleged grievances and represents a general standard which may be modified, when plant management and the Union agree that modifications would be in the interests of all concerned and provided such modifications are not in violation of this Agreement.

Grievances are to be processed through Step 4 within forty-five (45) days from the date of presentation of written grievance unless by mutual agreement, the time limit on any case or cases is extended.

It is agreed that the various works will be divided into zones, as mutually agreed upon by the Plant Management and the Union.

The actual number of members of the grievance committee at each works shall be mutually agreed upon between the General Superintendent of the Works and the

Union, and in no case shall there be more than one grievance committeeman in any department. Each grievance committeeman may, if the local Union so elects, appoint one assistant grievance committeeman to cover each turn on which he does not work. Such assistants, to a maximum of three per zone, shall be provided the same treatment as grievance committeemen except that they may handle grievances only in the first step of the grievance procedure.

Only employes of a plant may serve as grievance committeemen or assistant grievance committeemen for that plant. The Union shall certify to the Corporation the names of the employes it designates as grievance committeemen and assistant grievance committeemen, and those so certified will be afforded, with approval of supervision, such time off, without pay, as may be required to conduct legitimate Union business, except that witnesses called in by the Corporation shall be paid by the Corporation.

It is agreed that each local Union may, if it so elects, designate one grievance man per local Union to serve as a general grievance committeeman (except the Aliquippa Local Union shall be permitted two general grievance committeemen). The general grievance committeemen shall assist zone committeemen in settling grievances and shall act as the Union representatives in the third step of grievance procedure.

In the event that a grievance arises in any zone concerning an employe or group of employes and a satisfactory settlement has not been reached with the foreman, it shall then be the privilege of the aggrieved employe or employes, with the zone committeeman, to take up the grievance in Step two (2) of the grievance procedure.

The zone committeeman or the general grievance committee shall prepare a Statement of Complaint on a Union form, properly filled out and indicating the section of the Agreement under which the case is to be processed, which will then be presented to the department superintendent. Arrangments will be made to discuss the case as soon as possible. Subsequent to this discussion, the department superintendent will give the zone grievance committeeman a written answer.

C. I. O. Exhibit No. 1

Where a grievance has been answered by the superintendent in any department and the answer is not satisfactory to the grievance committee, it may be appealed to the General Superintendent of the Works or his designated representatives. The general grievance committee and the General Superintendent or his designated representatives shall hold joint meetings as often as they mutually deem necessary to hear cases appealed to them. Preceding these meetings the general grievance committee shall present to the General Superintendent, or his designated representatives, a list of the grievances to be discussed. In cases of discharge or other grievances that cannot be reasonably delayed, they shall be taken up at a special meeting to be properly arranged in advance with the General Superintendent, or his designated representatives, by the general grievance committee.

In cases where no agreement has been reached by the general grievance committee and the Works Management, they may then be appealed to the National Representative of the Organization and the executives of the Corporation and completed in accordance with the Agreement.

When the general grievance committee meets with the General Superintendent, or his designated representatives, other committeemen will meet with them only on grievances pertaining to their zone.

At all grievance committee meetings with the Management, only Works' employes with grievance committee credentials from the Union will be accepted. All meetings regular or special, between the grievance committee, or member or members thereof, various superintendents, or other representatives of the Management, shall be arranged in advance, at which time the subject, or subjects, to be discussed will be outlined.

In all grievances heard by either the department superintendent, or other representatives of the Management, and the grievance committee, or member or members thereof, it shall be admissible for either side to bring in employes of the Corporation who are involved in the grievance or who may aid in its solution. The grievance committeeman, employe, or employes involved in the grievance,

called in by the Union will receive no pay from the Corporation for the time involved in the hearing of the grievance.

Grievances not appealed from the decision rendered in Steps one, two, three or four within five (5) working days from the date of such decision shall be considered settled on the basis of the decision last made and shall not be eligible for further appeal.

Awards or settlements of grievances shall, in no case, be made retroactive beyond the date on which the grievance was officially presented to the foreman except in the case of pay shortages.

It is the purpose of this Section to provide procedure for prompt, equitable adjustment of alleged grievances. Failure to file alleged grievance complaints promptly on the occurrence or knowledge of the grievance is construed to be not consistent with the intent of this Section or of this Agreement.

The Union reserves the right to refuse to take a grievance on behalf of any employe who is not a member of the Union, and the Management may refuse to give consideration to any grievance unless it is taken up through the regular procedure.

Section 8—Management

The Management of the Works and the direction of the working forces, including the right to hire, suspend or discharge for proper cause, or transfer, and the right to relieve employes from duty because of lack of work, or for other legitimate reasons, is vested exclusively in the Corporation: Provided that this will not be used for purposes of discrimination against any member of the Union.

Section 9—Discharge Cases

In the exercise of its rights as set forth in Section 8, Management agrees that no employe shall be peremptorily discharged from and after the date hereof, but that in all instances in which Management may conclude that an employe's conduct may justify suspension or discharge, he shall be first suspended. Such suspension shall be for not

more than five (5) calendar days. During this period of initial suspension the employe may, if he believes that he has been unjustly dealt with, request a hearing and a statement of the offense before his department superintendent, or the representative of the Genera! Superintendent of the Plant with or without the member or members of the grievance committee present as he may choose. At such hearing the facts concerning the case shall be made available to both parties. After such hearing Management may conclude whether the suspension shall be converted into discharge or, dependent upon the facts of the case, that such suspension may be extended or revoked. If the suspension is revoked the employe shall be returned to employment and receive full compensation at his regular rate of pay for the time lost, but in the event a disposition shall result in either the affirmation or extension of the suspension or discharge of the employe, the employe may allege a grievance which shall be handled in accordance with the procedure of Section 7—"Adjustment of Grievances." Final decision on all suspension or discharge cases shall be made by the Corporation within five (5) days from the date of filing of the grievance, if any. Should it be determined by the Corporation or by an umpire in accordance with Step five (5) of the Grievance Procedure that the employe has been discharged or suspended unjustly, the Corporation shall reinstate the employe and pay full compensation at the employe's regular rate of pay for the time lost.

Section 10—Safety and Health

The Corporation shall continue to make reasonable provisions for the safety and health of its employes at the plant during the hours of their employment. All reasonable protective devices, wearing apparel and other equipment necessary to properly protect employes from injury shall be provided by the Corporation in accordance with the practices now prevailing at the respective plants. Proper heating and ventilating systems shall be installed where needed.

C. I. O. Exhibit No. 1

SECTION 11—RATE ESTABLISHMENT AND ADJUSTMENT

It is recognized that changing conditions and circumstances may from time to time require adjustment of wage rates or modification of wage rate plans because of alleged inequalities, development of new manufacturing processes, changes in the character of jobs, or mechanical improvements brought about by the Corporation in the interest of improved methods and product. Under such circumstances the following procedure shall apply:

1. When a bona fide new job or position is to be established—

a. Management will develop an appropriate rate by the regular procedure in effect in the Corporation for its industrial engineering and industrial relations activities, including the employment of job evaluation, and in the case of incentive rates the application of accepted industrial engineering methods.

b. Such procedure having been conformed to, the rate may be established by Management to cover the job or position in question. The Union grievance committeeman or committeemen representing the employe or employes to be affected shall be informed by Management in advance concerning such rates. The rate having been established may subsequently be subject to adjustment as provided in Paragraph "c" below.

c. If, after a reasonable trial period following the establishment by Management of the rate or rates for new jobs or positions, grievances are alleged by either employes or Management concerning such rates—which grievances cannot be satisfactorily adjusted by mutual agreement—the question as to the equity of such rates in relation to the plant rate structure and the requirements of the job or position as established by sound industrial engineering procedures may be appealed to an impartial umpire in accordance with the provisions of Section 7 (Adjustment of Grievances), but no formal grievance may be presented un-

der Section 7 until a reasonable period has elapsed since the installation of the rates and the operation of the equipment to which the new rates apply, which period will permit of study and adjustment, if necessary, of the rates to the varying conditions of operation attendant upon the establishment of the new operation to which the new jobs or positions apply. It is recognized that the term "reasonable period" may vary with the type of operation or equipment to which the new rates apply, but shall not be construed to apply to a period less than two (2) pay periods or in excess of six (6) pay periods unless otherwise mutually agreed.

2. Where alleged inequalities in wage rates prevail, the matter may be taken up for local Works adjustment and settlement made on a mutually satisfactory basis; provided, however, that grievances arising under this paragraph may not be processed beyond Step four of Section 7 hereof. This subsection is without prejudice to the rights of either the Corporation or the Union to submit cases arising hereunder to the National War Labor Board.

3. When technological changes are made in equipment, method of processing, material processed, or quality or production standards which would result in a substantial change in the character of the job, job duties or requirements; or where over a period of time an accumulation of minor changes of this type have occurred which, in total, have resulted in a substantial change in the character of the job, job duties or requirements, adjustments of hourly, incentive, and tonnage rates may be required. In such cases, Management may establish the new rates and the Union, if dissatisfied, may allege a grievance and carry it through all steps of the contract procedure established for the settlement of grievances for determination as to whether the earnings received by the employe from the new rates have resulted in a lowering of the rates applicable to him under Section 3 of this Agreement or a failure to provide proper compensation for such increased effort,

if any, brought about by the change in the job duties or requirements.

SECTION 12—HOLIDAYS

The following days shall be considered as holidays:

Independence Day — Labor Day — Christmas

On these holidays there shall be no regular production work except in cases of continuous operations; provided, however, that so long as the present war emergency exists, and in view of the government's request for all possible production, the Corporation will pay all employes at the rate of one and one-half times their normal regular rate of pay for hours worked on these holidays.

The term "continuous operations" applies to those departments which normally operate 24 hours per day, seven days per week and which cannot readily be suspended. Practices in regard to "continuous operations" shall be continued as at present in the various plants of the Corporation.

If, by reason of holiday observance, an employe otherwise scheduled to work on the day on which such holiday occurs is not required to work on that day, but is required to work what would have been his sixth day of work had he worked on such holiday, he shall be paid at the rate of time and one-half his regular rate of pay for hours worked on such day; where such hours are worked by mutual agreement between plant management and the grievance committee, the regular rate of pay shall apply.

The Corporation agrees to recognize Thanksgiving, New Year's Day and Memorial Day as additional holidays in compliance with the provisions of Presidential Executive Order No. 9240, dated September 10, 1942, so long as such Executive Order No. 9240 remains in effect.

SECTION 13—PRIOR AGREEMENTS

This Agreement shall supersede all existing and previous agreements. All local rules, regulations and customs heretofore established in conflict with this Agreement are hereby abolished, but prior practice and custom not in conflict with this Agreement may be continued.

No grievances which arose prior to the date of this 1942 Agreement shall be taken up for adjustment except that grievances which as of the date of the 1942 Agreement have been appealed in writing from a decision in the prior steps of the grievance procedure defined in the prior agreements or are in the process of being adjusted must be considered under the procedures of Section 7 of the 1942 Agreement and be determined in accordance with the applicable provisions of the 1942 Agreement.

SECTION 14—MILITARY SERVICE

Any employe, except a temporary employe, who is inducted into the land or naval forces of the United States or any employe who volunteers for enlistment and is granted a Special Military Leave of Absence and who makes application for re-employment within forty (40) days after he is first honorably discharged from service, shall be re-employed on the basis of his accumulated seniority; provided he is able to do the work and his work is available. While such employe is in the armed service of the United States, he shall continue to accumulate seniority as though in the active employ of the Corporation, and upon return to employment, shall be eligible for vacation due him on the basis of this accumulated seniority and in conformity with Section 5 hereof.

If an employe so applying for re-employment shall so request, he shall be granted a leave of absence without pay, not to exceed sixty (60) days before he shall return to work.

SECTION 15—TERMINATION DATE

The terms and conditions of this Agreement shall continue in effect until changed or terminated, as follows:

a. Either party may at any time and from time to time give ten (10) days' written notice to the other party of the time for the commencement of a conference of the parties for the purpose of negotiating the terms and conditions of a change of the 1942 Agreement, which conference shall be at the office of

the Corporation in Pittsburgh, Pennsylvania, unless otherwise mutually agreed, and

b. If, because of failure to agree the 1942 Agreement is not changed by a written agreement entered into by the Corporation and the Union within thirty (30) days from the giving of said notice, then the 1942 Agreement and all of the provisions thereof, shall terminate upon the expiration of forty days from the giving of said notice.

Notice hereunder shall be given by registered mail, be completed by and at the time of mailing, and if by the Corporation, be addressed to United Steelworkers of America, Commonwealth Building, Pittsburgh, Pennsylvania, and if by the Union, be addressed to the Corporation at Jones & Laughlin Building, Pittsburgh, Pennsylvania. Either party may, by like written notice, change the address to which registered mail notice to it shall be given.

Signed this eleventh day of December, 1942.

JONES & LAUGHLIN STEEL CORPORATION

By S. S. MARSHALL, Jr.,
Vice President

By E. F. BLANK,
Director of Personnel Relations

UNITED STEELWORKERS OF AMERICA

By PHILIP MURRAY,
President

By DAVID J. McDONALD,
Secretary-Treasurer

By FRANK BURKE,
Director, District 16

By JOHN GRECULA,
Director, District 14

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By BERT HOUGH,
Director, District 20

By WILLIAM F. DONOVAN,
Director, District 28

By CLIFFORD J. SHORTS,
International Representative

By JOSEPH KRIVAN,
Representative

By LEO E. CASEY,
Representative

By THOMAS P. McNAMARA,
Local Union No. 185

By THOMAS GORMAN,
Local Union No. 186

By JACK FERLINE,
Local Union No. 187

By WILLIAM F. KRUPP,
Local Union No. 188

By WILBUR R. EATON,
Local Union No. 1257

By JOS. ROY MURRAY,
Local Union No. 1843

By JOHN T. ARMSTRONG,
Local Union No. 1843

By SAM BIELICH,
Local Union No. 1272

By FRED SKILES,
Local Union No. 1272

By JOHN T. ATKINSON,
Local Union No. 1211

By MICHAEL KATCHUR,
Local Union No. 1211

By EDWARD C. HOFFMAN,
Local Union No. 2587

By THOMAS J. HICKEY,
Local Union No. 2587

REPORT ON ORDERED ELECTION

(Filed May 31, 1943)

ELECTION HELD May 26, 1943 at CLEVELAND, OHIO

Pursuant to the Rules and Regulations of the National Labor Relations Board (herein called the Board), the undersigned hereby reports that the election heretofore directed by the Board in the above-entitled case was conducted in accordance with the notice of election attached hereto and with the following results:

Approximate number of eligible voters	56
Count of Ballots:	
Total ballots cast	52
Total ballots challenged	None
Total void ballots	None
Total valid votes counted	52
Votes cast for United Steelworkers of America (CIO)	37
Votes cast against United Steelworkers of America (CIO)	15

The counting and tabulating were fairly and accurately done. Statements to such effect from the observers to the election are on file.

The Undersigned finds that United Steelworkers of America (CIO) has been designated and selected by a majority of the employees in the bargaining unit found by the Board in its Decision in this proceeding to be appropriate and recommends that the Board so certify.

Dated at Cleveland, Ohio,
this 27th day of May, 1943.

(s) WALTER E. TAAG,
Regional Director,
National Labor Relations Board.

CERTIFICATION OF REPRESENTATIVES

(Issued June 5, 1943)

On May 26, 1943, pursuant to the Decision and Direction of Election issued by the Board herein on May 3, 1943, an election by secret ballot was conducted under the direction and supervision of the Regional Director for the Eighth Region (Cleveland, Ohio). Thereafter, on May 27, 1943, in accordance with the Rules and Regulations of the Board, a Report on Ordered Election was issued and served upon the parties. No objections to the said report, or to the conduct of the ballot, have been filed by any of the parties. The report shows as follows:

Approximate number of eligible voters	56
Total ballots cast	52
Total ballots challenged	0
Total void ballots	0
Total valid votes counted	52
Votes cast for United Steelworkers of America (CIO)	37
Votes cast against United Steelworkers of America (CIO)	15

By virtue of and pursant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Sections 9 and 10, of National Labor Relations Board Rules and Regulations—Series 2, as amended,

IT IS HEREBY CERTIFIED that United Steelworkers of America (CIO) has been designated and selected by a majority of all patrolmen, watchmen, and firemen, including dump laborers employed by the Jones & Laughlin Steel Corporation at its Otis Works, Cleveland, Ohio, but excluding lieutenants, captains, and supervisors, as their representative for the purposes of collective bargaining, and that, pursuant to Section 9 (a) of the Act, the said organization is the exclusive representative of all such employees for the purposes of collective bargaining with

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1 49 N.L.R.B., No. 50.

respect to rates of pay, wages, hours of employment, and other conditions of employment.

Signed at Washington, D. C., this 5th day of June, 1943.

HARRY A. MILLIS, *Chairman*,
GERARD D. REILLY, *Member*,
JOHN M. HOUSTON, *Member*,
(SEAL) National Labor Relations Board.

CASE No. 8-C-1548

UNITED STATES OF AMERICA

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

EIGHTH REGION

In the matter of JONES AND LAUGHLIN STEEL CORP., and UNITED STEELWORKERS OF AMERICA (CIO).	Case No. 8-C-1548

COMPLAINT

(Issued September 16, 1943)

It having been charged by the United Steelworkers of America, affiliated with the Congress of Industrial Organizations, hereinafter called the Union, that Jones & Laughlin Steel Corporation, hereinafter called the Respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, 49 Stat. 449, hereinafter referred to as the Act, the National Labor Relations Board, by its Regional Director for the Eighth Region, as agent for the National Labor Relations Board, designated by the National Labor Relations Board Rules and Regulations, Series 2, as amended, hereby issues its Complaint and alleges the following:

1. Respondent is and has been for a long period of time a corporation organized under and existing by virtue of the laws of the State of Pennsylvania, having its principal office in the City of Pittsburgh, Pennsylvania, and operating plants in the City of Cleveland, Ohio, known

as the Otis Works, and plants at Pittsburgh, Pennsylvania, and Aliquippa, Pennsylvania, and is now and for some time past has been continuously engaged in the production, manufacture, sale, and distribution of iron and steel products.

2. Respondent, in the course and conduct of its business, causes and has continuously caused over a long period of time a substantial part of the coal, limestone, ore, and other raw materials used in the manufacture of its products to be purchased and transported in interstate commerce from and through states of the United States other than the States of Ohio and Pennsylvania, to its plants in the States of Ohio and Pennsylvania, and causes and has continuously caused over a long period of time a large part of the products manufactured by it to be sold, shipped and transported in interstate commerce from its plants in the States of Ohio and Pennsylvania to, into and through states of the United States other than the States of Ohio and Pennsylvania.

3. Respondent is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

4. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

5. All patrolmen, watchmen, and firemen, including dump laborers, employed by the Respondent at its Otis Works, Cleveland, Ohio, but excluding lieutenants, captains, and supervisors, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act, as found by the National Labor Relations Board in the matter of Jones & Laughlin Steel Corporation, Otis Works, and United Steelworkers of America (CIO), Case No. R-5143, decided May 3, 1943.

6. Since on or about May 26, 1943, and at all times thereafter, a majority of the employees in the aforesaid appropriate unit have designated and selected the Union as their representative for the purposes of collective bargaining with Respondent, such designation and selection having been made pursuant to an election by secret ballot directed by the National Labor Relations Board in the

aforesaid Case No. R-5143, and conducted under the supervision of the Regional Director for the Eighth Region of the National Labor Relations Board on May 26, 1943.

7. On June 5, 1943 the National Labor Relations Board, by virtue of and pursuant to the power vested in it by Section 9 (c) of the Act, and pursuant to Article III, Sections 9 and 10 of the National Labor Relations Board Rules and Regulations, Series 2, as amended, certified that the Union had been designated and selected by a majority of all the employees in the aforesaid appropriate unit as their representative for the purposes of collective bargaining, and that, pursuant to Section 9 (a) of the Act, the said Union was the exclusive representative of all the employees in the aforesaid appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment. At all times since the said certification the Union has been, and continues to be, the exclusive representative of all the employees in the aforesaid appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

8. Since on or about May 28, 1943, and at all times thereafter, the Union, by its officers, agents, and representatives, requested the Respondent to bargain collectively with respect to rates of pay, wages, hours of employment, and other conditions of employment with the Union as the exclusive representative of all the employees in the aforesaid appropriate unit.

9. Respondent, by its officers, agents, and representatives, while engaged as described above, has refused to recognize and accept as appropriate the aforesaid unit found by the National Labor Relations Board to be an appropriate unit as set forth in Paragraph 5, above, and has, since on or about June 23, 1943, and at all times thereafter, failed and refused and continues to fail and refuse to recognize the Union as the exclusive representative of its employees in the aforesaid appropriate unit, and has, since on or about June 23, 1943, and at all times there-

after, failed and refused and continues to fail and refuse to bargain with the Union with respect to rates of pay, wages, hours of employment, and other conditions of employment.

10. By the aforementioned acts of Respondent, acting through its officers, agents, and representatives, and by each of them, as alleged and set forth in Paragraph 9, above, Respondent did refuse and continues to refuse to bargain collectively with representatives of its employees, and by all of the said acts and by each of them did engage in and is now engaging in unfair labor practices within the meaning of Section 8 (5) of the Act.

11. By the aforementioned acts of Respondent, acting through its officers, agents, and representatives, and by each of them, as alleged and set forth in Paragraph 9, above, Respondent did interfere with, restrain and coerce, and is now interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and by all of the said acts, and by each of them, has engaged in and is now engaging in unfair labor practices within the meaning of Section 8 (1) of the Act.

12. The acts and conduct of Respondent, as alleged and set forth in Paragraphs 9, 10 and 11, above, occurring in connection with the operations of Respondent, as set forth and described in Paragraphs 1 and 2, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

13. The acts and conduct of Respondent, as alleged and set forth in Paragraphs 9, 10 and 11, above, constitute unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7), of the Act.

WHEREFORE, the National Labor Relations Board on this 16th day of September, 1943, issues this, its Complaint,

against the Jones & Laughlin Steel Corporation, Respondent herein.

WALTER E. TAAG,
Regional Director,
National Labor Relations Board,
Eighth Region.

NOTICE OF HEARING

PLEASE TAKE NOTICE that on the 28th day of September, 1943, at 10:00 a. m., Eastern War Time, at 702 Public Square Building, Cleveland, Ohio, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

A copy of the Charge upon which the Complaint is based is attached hereto.

You are further notified that you have the right to file with the Regional Director for the Eighth Region, with offices at 713 Public Square Building, Cleveland, Ohio, acting in this matter as agent of the National Labor Relations Board, an answer to the said Complaint, within ten (10) days from the service thereof.

PLEASE TAKE NOTICE that duplicates of all exhibits which are offered in evidence will be required unless, pursuant to request or motion, the Trial Examiner in the exercise of his discretion and for good cause shown, directs that a given exhibit need not be duplicated.

IN WITNESS WHEREOF the National Labor Relations Board has caused this, its Complaint and Notice of Hearing, to be signed by the Regional Director for the Eighth Region on this 16th day of September, 1943.

WALTER E. TAAG,
Regional Director,
National Labor Relations Board.

ANSWER

(Sworn to September 24, 1943)

Comes now Jones & Laughlin Steel Corporation, Respondent in the above-entitled proceeding and files this, its Answer to the Complaint issued on September 16, 1943, by the Regional Director for the Eighth Region (hereinafter referred to as the Director), as agent of the National Labor Relations Board (hereinafter referred to as the Board), upon charges having been filed with the Director by United Steelworkers of America affiliated with the Congress of Industrial Organizations (hereinafter referred to as the Union) alleging that the Respondent has engaged and is now engaging in certain unfair labor practices violative of the National Labor Relations Act (hereinafter referred to as the Act).

1. Respondent admits that it is incorporated under the laws of the Commonwealth of Pennsylvania, maintains its principal office in the City of Pittsburgh, Pennsylvania, has been and is now operating steel mills located at Pittsburgh, Aliquippa and McKeesport, Pennsylvania and Cleveland, Ohio, all of which are engaged in the manufacture of semi-finished and finished steel products.

2. Respondent admits that the allegations contained in Paragraph 2 of the Complaint are substantially true in fact.

3. Respondent admits that it is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

4. Respondent admits that the Union is a labor organization within the meaning of Section 2 (5) of the Act.

5. Respondent denies that all patrolmen, watchmen and firemen, including dump laborers, employed by the Respondent at its Otis Works, Cleveland, Ohio, but excluding lieutenants, captains and supervisors, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act, as found in Board Case No. R-5143.

6. Respondent admits that on or about May 26, 1943, a majority of the employes in the alleged appropriate unit,

by secret ballot selected the Union as their representative, that the election was held pursuant to the Board's Direction, conducted by Board's agents, all in conformity with the established procedure of the Board. The Complaint alleges that "at all times thereafter" the majority status continues; Respondent answers that it has no knowledge concerning the averment.

7. Respondent admits that on or about June 5, 1943, the Board issued its Certification of Representatives pursuant to Section 9 (a) and Section 9 (c) of the Act.

The Complaint alleges that " at all times since the said certification, the Union has been, and continues to be the exclusive representative". Respondent answers that it does not know whether or not the designation is continuing.

8. Respondent admits that on or about May 28, 1943, the Union, by its agent, made a request of Respondent to bargain collectively with the Union as representative of employes in the alleged appropriate unit.

9. Respondent admits that it has refused to recognize and accept as appropriate the unit found by the Board to be appropriate.

Respondent admits that on or about June 23, 1943, a refusal to bargain with representatives of the Union was made.

Respondent denies that "since on or about June 23, 1943 and at all times thereafter" it has refused to bargain with representatives of the Union.

The Board's agent, by letter dated August 14, 1943, directed an inquiry to Respondent; excerpts from said letter are as follows:

> *"The Union has submitted to me a letter under date of June 23, signed by your company. You state, in substance, that you consider a unit of guards inappropriate and you, therefore, decline to bargain with the certified Union for such class of employes. Will you please let me know if this is the definite position taken by the Company in this matter."*

Answer to Complaint

Respondent, by letter dated September 4, 1943, replied to the inquiry, the pertinent excerpts being as follows:

> *"Recently, we have had a National Labor Relations Board hearing in a case involving Plant Guards at the Pittsburgh Works of the Corporation and are awaiting a decision in that case. Therefore, we are deferring an answer with respect to bargaining with representatives of units composed of Plant Guards until such time as a final position of the Corporation has been established."*

Respondent submits that its refusal to bargain is qualified and conditional and not final and conclusive as alleged in the Complaint.

10. Respondent denies the allegations contained in Paragraphs 10, 11, 12 and 13 of the Complaint.

JONES & LAUGHLIN STEEL CORPORATION,
By E. F. BLANK,
Director of Personnel Relations.

September 24, 1943

COMMONWEALTH OF PENNSYLVANIA, }
COUNTY OF ALLEGHENY } ss:

Before me, the undersigned, a Notary Public in the County and Commonwealth aforesaid, personally appeared Earl F. Blank, who being by me duly sworn, did depose and say that he is the duly authorized agent with power of attorney for Jones & Laughlin Steel Corporation, Respondent in the within Answer, and authorized to make this affidavit in its behalf; that the statements of fact set forth in the within Answer are true and correct.

E. F. BLANK,
Jones & Laughlin Building,
Third Avenue & Ross Street,
Pittsburgh, Pennsylvania.

Sworn to and subscribed to before me this 24th day of September, A. D. 1943.

SEAL) HOWARD L. SNYDER, *Notary Public,*

My commission expires February 24, 1946.

TRANSCRIPT OF TESTIMONY

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

EIGHTH REGION

1*

In the matter of JONES & LAUGHLIN STEEL CORPORATION, and UNITED STEELWORKERS OF AMERICA, CIO.	Case No. 8-C-1548

Room 702, Public Square Bldg.,
Cleveland, Ohio,
Tuesday, September 28, 1943.

Pursuant to notice, the above-entitled matter came on for hearing at 10 a. m.

Before: JOHN H. EADIE, Trial Examiner.

APPEARANCES:

John Robert Hill, Esq., for the Board.

James C. Beech, Esq., Jones & Laughlin Building, 3rd Avenue & Ross Street, Pittsburgh, Pennsylvania, for Respondent.

William F. Donovan, Director, and *Leo E. Casey*, Representative, 804 Chester-Ninth Building, Cleveland, Ohio, for United Steelworkers of America, (CIO).

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* Inset numbers appearing at outer edge of text indicate page numbers of original stenographic transcript of testimony.

PROCEEDINGS

Trial Examiner Eadie: • • •

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5 The Trial Examiner will allow an automatic exception to all adverse rulings, and upon appropriate order an objection and exception will be permitted to stand to an entire line of questioning.

• • • • • • • • • • •

I make this announcement at this time in order that the parties may schedule their time accordingly.

6 Mr. Hill: Mr. Reporter, will you please mark this as Board's Exhibits 1-A to 1-G, inclusive, for identification?

(Thereupon, the documents above referred to were marked Board's Exhibits 1-A to 1-G, inclusive, for identification.)

Mr. Hill: Mr. Examiner, I have had marked for identification, Board's Exhibits 1-A to 1-G, for identification, a series of papers, or I should say documents. These documents consist of:

Board's Exhibit 1-A, a copy of the Board's Rules and Regulations, Series 2 as Amended.

Board's Exhibit 1-B, copy of Amended Charge in the instant case, signed by Leo E. Casey, representative of the United Steelworkers of America (CIO).

Board's Exhibit 1-C, Complaint in the instant case, signed by Walter E. Taag, Regional Director of the Board's Eighth Regional office.

Board's Exhibit 1-D, Notice of Hearing, setting the hearing on the 28th day of September, 1943, at 702 Public Square Building, Cleveland, Ohio; where we are presently in session, at 10 o'clock A. M., Eastern Standard Time.

Board's Exhibit 1-E, Affidavit as to Service, indicating service on the Company, both at Cleveland and

7 Pittsburgh, and United Steelworkers of America, (CIO), at Cleveland.

Board's Exhibit 1-F, Copy of Respondent's Answer in the instant case, subscribed and sworn to by E. F. Blank,

Director of Personnel Relations, Jones & Laughlin Steel Corporation.

Board's Exhibit 1-G, copies of a telegram sent to all parties hereto, scheduling this hearing to commence at 11 o'clock Eastern War Time, or 10 o'clock A. M., Eastern Standard Time, on which Cleveland now operates, rather than 10 o'clock A. M., Eastern War Time as originally scheduled, and signed by Walter E. Taag, Regional Director of the Board's Eighth Regional office.

I offer Board's Exhibits 1-A to 1-G, inclusive, for identification, in evidence.

Trial Examiner Eadie: Is there any objection?

Mr. Beech: No objection, Mr. Examiner.

Mr. Donovan: No.

Trial Examiner Eadie: It will be received in evidence.

(Whereupon, the documents heretofore marked Board's Exhibits 1-A to 1-G, inclusive, for identification, were received in evidence.)

Mr. Hill: May I add, Mr. Examiner, that Board's Exhibit 1-A to 1-G, inclusive, is offered in duplicate, and I will point out that Board's Exhibit 1-G in the duplicate consists of four telegrams rather than one, inasmuch as the copy of 1-G draft in the original of Board's Exhibit 1-A to 1-G, inclusive, was telephoned from the telegraph office, in fact, the message was phoned in, and, due to requirements of the War Communications Board, unless there are at least seven addresses on a telegram, you have to make them out as separate telegrams, so Board's Exhibit 1-G really consists of four parts in the duplicate.

8

Trial Examiner Eadie: I see.

Mr. Hill: At this time, if it please the Examiner, I wish to put in the record by stipulation certain facts concerning the operations of the Company.

It is stipulated and agreed by and among all the parties, that Jones & Laughlin Steel Corporation, hereinafter referred to as the Respondent, is a corporation, organized and existing by virtue of the laws of the Commonwealth of Pennsylvania, maintaining its principal office in the City of Pittsburgh, Pennsylvania.

Respondent is engaged in the manufacture of semi-finished and finished steel products, and it is the fourth largest producer of steel in the United States.

Respondent operates steel mills located at Pittsburgh, Aliquippa, and McKeesport, Pennsylvania.

Respondent is licensed to do business in the state of Ohio, and operates steel mills, known as the Otis Works in the City of Cleveland, Ohio. The Otis Works consists of two plants, known as the Riverside plant, employing approximately 3200 employees, and the Lakeside plant, employing approximately 1500 employees. Respondent, with its subsidiary companies, employs approximately 40,000 employees.

During the year 1942, Respondent used coal, limestone, iron ore and other raw materials at its Ohio and Pennsylvania plants in excess of $50,000,000 in money value, of which approximately 50 percent originated at points outside the states of Ohio and Pennsylvania.

During the year 1942 the value of finished products produced by the Respondent at its Ohio and Pennsylvania plants was in excess of $225,000,000, of which approximately 50 percent was shipped to points outside the states of Ohio and Pennsylvania.

More specifically, dealing with the operations of Respondent at its Otis Works, Respondent used coal, limestone, iron ore and other raw materials at its Otis Works during the year 1942 in excess of $1,000,000; approximately 50 percent of which came from points outside the state of Ohio. During the year 1942, Respondent manufactured approximately 1,000,000 tons of ingot steel as its finished products, in excess of 50 per cent of which was shipped to points outside the state of Ohio.

Respondent concedes that it is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act.

Do you so stipulate, Mr. Beech?

Mr. Beech: Respondent so stipulates.

Mr. Hill: Do you so stipulate, Mr. Donovan?

Mr. Donovan: Yes.

Trial Examiner Eadie: This proceeding, I take it, is concerned only with the Otis Works?

Mr. Hill: That is correct.

• • • • • • • • • •

(Thereupon, the document above referred to
11 was marked Board's Exhibit 3, for identification.)

Trial Examiner Eadie: Just a moment, please, Mr. Hill, in the decision and direction of election, the Board finds that all patrolmen, watchmen, and firemen, including dump laborers, but excluding lieutenants, captains, and supervisors, constitute the appropriate unit.

Mr. Hill: That is correct, and that is the unit alleged, Mr. Examiner.

Trial Examiner Eadie: The same you allege in the Complaint?

Mr. Hill: Yes, paragraph 5 of the Complaint, to
12 be the appropriate unit, and to be the unit found by the Board in Case No. R-5143 to be appropriate.

Trial Examiner Eadie: Now, as I understand, at the time of this "R" case, the Company contended that that was not an appropriate unit, and the Board rejected the Company's contention at that time.

Mr. Hill: I think that is a correct statement. Is it not, Mr. Beech?

Mr. Beech: That is true.

Trial Examiner Eadie: All right.

Mr. Hill: I have had marked for identification as Board's Exhibit 3, a copy of the Certification of representatives in the matter of the Jones & Laughlin Steel Corporation, Otis Works, and United Steelworkers of America, (CIO), before the National Labor Relations Board, dated June 5, 1943.

That is offered, in duplicate, Mr. Examiner.

Trial Examiner Eadie: You offer that in evidence?

Mr. Hill: Yes, Board's Exhibit No. 3.

Trial Examiner Eadie: Any objection to it?

Mr. Beech: No objection.

Trial Examiner Eadie: It will be received in evidence as Board's Exhibit 3.

(Whereupon, the document heretofore marked Board's Exhibit 3, for identification, was received in evidence.)

13 Mr. Hill: Mr. Reporter will you please have this marked as Board's Exhibit No. 4, for identification?

(Thereupon, the document above referred to was marked Board's Exhibit No. 4, for identification.)

Mr. Hill: Mr. Examiner, I have had marked for identification, Board's Exhibit 4, a carbon copy of a letter dated May 28, 1943, addressed to Mr. Earl F. Blank, director of Personnel Relations, Jones & Laughlin Steel Corporation, Pittsburgh, Pennsylvania, signed by William F. Donovan, District Director.

I will ask the Company, the Respondent, and the Union if it may be stipulated that Board's Exhibit 4 for identification is a true and correct copy of the original letter of which Board's Exhibit 4 for identification, purports to be?

Mr. Donovan: It is.

Mr. Hill: And, further, that Board's Exhibit 4 for identification, was written and sent to the Respondent Corporation by William F. Donovan, District Director of District No. 28 on behalf of the United Steelworkers of America, CIO.

Trial Examiner Eadie: Was it received?

Mr. Hill: And that it was received by Respondent Corporation.

May it be so stipulated, Mr. Beech?

14 Mr. Beech: Mr. Examiner, Respondent will stipulate that the proffered copies of letters are duplicates of the original which was received by the Jones & Laughlin Corporation.

Mr. Hill: And may it be stipulated, further, Mr. Beech, that the original of Board's Exhibit 4 for identification was on the letterhead of the United Steelworkers of America, District 28 (CIO)?

Mr. Beech: That is a correct designation, yes.

Mr. Hill: And may it be so stipulated?

Mr. Beech: It did appear on the original of the letter?

Mr. Hill: May it be so stipulated, Mr. Donovan?

Mr. Donovan: Yes.

Mr. Hill: And may it also be stipulated, Mr. Beech, that the letter was sent on behalf of the United Steelworkers of America (CIO)?

Mr. Beech: Yes, it may.

Mr. Hill: And you so stipulate, Mr. Donovan?

Mr. Donovan: We so stipulate.

Mr. Hill: I offer Board's Exhibit No. 4 for identification in evidence.

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(Whereupon, the document heretofore marked
15 Board's Exhibit No. 4, for identification, was received in evidence.)

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Mr. Hill: May it be further stipulated that Board's Exhibit No. 5 was received by the United Steelworkers of America (CIO)?

16 Mr. Donovan: So stipulate.

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(Whereupon, the document heretofore marked Board's Exhibit No. 5, for identification, was received in evidence.)

Mr. Hill: I have had marked for identification as Board's Exhibit No. 6, a copy of a letter on the letterhead of the Jones & Laughlin Steel Corporation, to all patrolmen, watchmen, firemen and dump laborers at the Otis Works of the Jones & Laughlin Steel Corporation, signed by Jones & Laughlin Steel Corporation, dated May 25, 1943.

May it be stipulated, Mr. Beech, that Board's Exhibit No. 6, for identification, is the statement referred to
17 in the second paragraph of Board's Exhibit No. 5, the second sentence of said paragraph, stating: "Proof of this is to be found in the Statement dated May 25, 1943, handed each plant guard at the Otis Works."

Mr. Beech: It may; whether or not it was handed to them or delivered in a letter, I do not know. However, Respondent stipulates it was transmitted to the plant guards.

Trial Examiner Eadie: Board's Exhibit 6 is the statement, it is stipulated that Board's Exhibit 6 is the statement referred to in Board's Exhibit 5?

Mr. Beech: It is, Mr. Examiner.

Mr. Hill: And counsel for Respondent also stated that he would stipulate that it was transmitted to the employees named in the heading of Board's Exhibit 6 for identification.

Trial Examiner Eadie: Yes, is that so stipulated?

Mr. Beech: Yes, in some manner, yes.

Trial Examiner Eadie: All right.

Mr. Hill: And may it be stipulated that it was transmitted to those said employees on May 25, 1943, the date appearing on Board's Exhibit 6 for identification?

Trial Examiner Eadie: On or about.

Mr. Hill: On or about.

Mr. Beech: On or about would be more precise.

Trial Examiner Eadie: Is it so stipulated?

Mr. Beech: Yes.

Mr. Hill: I offer Board's Exhibit No. 6 for identification, in evidence.

18

Trial Examiner Eadie: Any objection?

Mr. Beech: No objection.

Trial Examiner Eadie: It will be received in evidence as Board's Exhibit No. 6.

(Whereupon, the document heretofore marked Board's Exhibit No. 6 for identification, was received in evidence.)

Mr. Hill: If it please the Examiner, the Board rests.

Mr. Beech: Mr. Examiner, I believe Respondent's Answer sets forth pretty well Respondent's position with reference to the case, however, I should like to elaborate a little bit by—

Trial Examiner Eadie: Before you begin, Mr. Beech, I think we will take a five-minute recess, I would like to study your Answer a little further.

Mr. Beech: All right.

(Thereupon, a short recess was taken.)

Trial Examiner Eadie: The hearing will come to order.

Mr. Beech: Mr. Examiner, in order to clarify Respondent's position, I should like to introduce in evidence copies of an exchange of correspondence between Respondent and the agents of the Eighth Regional Office of the National Labor Relations Board.

(To the reporter) Mark this as Respondent's Exhibit No. 1, for identification.

* * * * * * * * * *

Respondent offers Exhibit 1 in evidence, in duplicate.

Trial Examiner Eadie: In duplicate?

20 Mr. Beech: Yes.

Mr. Hill: There is an objection, Mr. Examiner, on the ground of immateriality and irrelevancy. I can see no relevancy in this proceeding of the letter to Respondent Corporation informing them of the filing of the charge. I think it may very well be presumed that the Respondent Corporation was informed that charges were filed.

Trial Examiner Eadie: I will overrule the objection. It will be received in evidence as Respondent's Exhibit 1.

(Whereupon, the document heretofore marked Respondent's Exhibit 1, for identification, was received in evidence.)

Mr. Beech: (To the reporter) Mark this as Respondent's Exhibit 2, for identification.

(Thereupon, the document above referred to
21 was marked Respondent's Exhibit 2, for identification.)

Mr. Hill: I might state, Mr. Examiner, the purpose of my objection was not only to immateriality and irrelevancy, I realize that it comes a little late, but I also want to inquire whether the Respondent is asking the Board to take notice of any particular part of Respondent's Exhibit 1.

Mr. Beech: Mr. Examiner, the particular reference is made to the last paragraph, being an inquiry of the present position of Respondent with respect to bargaining.

Respondent's Exhibit 2, marked for identification, is a letter under date of September 4, 1943, addressed to Mr. Louis Plos, Field Examiner, National Labor Relations Board, Eighth Region, Public Square Building, Cleveland, Ohio. Re: Jones & Laughlin Steel Corporation, Otis Works, Case No. 8-C-1548.

• • • • • • • • • •

It is offered in evidence in duplicate.

Mr. Hill: Before waiving any objection, Mr. Ex-
22 aminer, I wish to inquire of Respondent's counsel whether Respondent's Exhibit 2, for identification, purports to be a letter in response to Respondent's Exhibit 1? I am compelled to make that inquiry by virtue of the first paragraph in Respondent's Exhibit No. 2,
23 marked for identification, which states that (Reading): "Referring to our telephone conversation of yesterday, representatives of Jones & Laughlin Steel Corporation will be pleased to confer with you in your office concerning the charges filed in the above-named case."

Mr. Beech: Respondent's Exhibit No. 2 is in answer to the letter of the National Labor Relation Board's agent, in addition to reference to the telephone conversation referred to in said letter.

Mr. Hill: But counsel certainly does not maintain that Respondent's Exhibit No. 2 purports to be, on its face, an answer to Respondent's Exhibit No. 1, does it?

Mr. Beech: Reference is made to the telephone conversation, however, the letter carries an answer to Mr. Plost's inquiry of August 14th, which I believe is the date.

Trial Examiner Eadie: Just a moment.

(The Examiner referred to documents.)

Trial Examiner Eadie: Has your question been answered?

Mr. Hill: Yes, and I think the record will show that Respondent's Exhibit 2 for identification refers only to a telephone conversation, and makes no reference to any letter of August 14, 1943, or of any other date.

Trial Examiner Eadie: The exhibit in itself.

Mr. Hill: That is correct; and, also, before waiving any

possible objections I may have to the offering in
24 evidence of Respondent's Exhibit 2 for identification, I would like to ask counsel for clarification or an interpretation of the third paragraph of Respondent's Exhibit 2 for identification, to wit:

> (Reading) "Therefore, we are deferring an answer with respect to bargaining with representatives of units composed of Plant Guards until such time as a final position of the Corporation has been established."

Therefore, I ask counsel for the Respondent if it is the position of the Respondent that it will now bargain with the United Steelworkers of America, CIO, as exclusive representative of the employees of the unit found appropriate in Case No. R-5143; or does Respondent desire to think it over? Is that the meaning carried in Respondent's Exhibit 2 for identification?

Mr. Beech: Possibly I can clarify that as I go along with the case.

Mr. Hill: The reason I ask that now, Mr. Beech, was to avoid the waiver of any objections I might have to Respondent's Exhibit 2 for identification.

Mr. Beech: Well, Respondent's Exhibit 2 offered is merely put in for a statement of the present position as of September 4, 1943, the date of the letter.

Mr. Hill: Is the present position of Respondent Corporation one of agreeing to bargain with the Union of this date or wanting to think it over until some further and unspecified date?

25 Mr. Beech: Yes. I might state that Respondent hasn't taken a definite position as of this date.

Trial Examiner Eadie: In other words, it is the Respondent's position as of this date that it is still not ready to say that it is willing to bargain with the Union?

Mr. Beech: It is not prepared to say it will or will not, at this time, Mr. Examiner.

Mr. Hill: In other words, Respondent Corporation desires and will take time to think this matter over.

Mr. Beech: That is true.

Trial Examiner Eadie: At any rate, as of today the Respondent is not prepared to say that it will bargain with the Union.

Mr. Beech: That's true.

Mr. Hill: With that answer of counsel for the Respondent I have no objection to the offer in evidence.

Trial Examiner Eadie: It will be received as Respondent's Exhibit No. 2.

(Whereupon, the document heretofore marked Respondent's Exhibit 2, for identification, was received in evidence.)

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Mr. Beech: Respondent's Exhibits 3-A, 3-B, and 3-C, marked for identification, are copies of letters ad-
26 dressed to the Chairman and Board Members of the National Labor Relations Board, the letter being as follows:

• • • • • • • • • • •

Mr. Hill: There is an objection, Mr. Examiner, if the contents of this letter are in reference to any other case, even though it involves the Respondent Corporation, other than the instant case.

Trial Examiner Eadie: What is your position on it, Mr. Beech?

Mr. Beech: It is being introduced to clarify Respondent's present position in respect to bargaining with units composed of Plant Guards and are copies of letters addressed to the National Labor Relations Board that I should like to introduce in evidence.

Mr. Hill: I submit, Mr. Examiner, that the Respondent's position in regard to any other unit, or any other simi-
lar unit in any other plant of the Respondent Cor-
27 poration, has no materiality or relevancy or bearing whatsoever on the issues of this case. Either the Respondent Corporation has bargained or has refused to bargain.

Trial Examiner Eadie: Without commenting on that, I will overrule the objection and permit Mr. Beech to read it into the record.

• • • • • • • • • •

28 Respondent's Exhibits 3-A, 3-B, and 3-C, are copies of letters addressed to individual Board members.

Mr. Hill: Are they identical to the copy which you just read, Mr. Beech?

29 Mr. Beech: Yes. 3-B and 3-C being different addresses.

Trial Examiner Eadie: Is that offered in evidence?

Mr. Beech: I offer them in evidence, Mr. Examiner.

Mr. Hill: The same objection that I previously made, Mr. Examiner, to the offer of the Respondent's Exhibits 3-A to 3-C, inclusive. I object to the offer in evidence of the Respondent's Exhibits 3-A, 3-B, and 3-C, for identification on the grounds that the Respondent's position in any other litigation other than the instant case can have no possible materiality or relevancy in this proceeding.

Mr. Beech: It certainly is relevant with respect to Respondent's position, Mr. Examiner. We should like to introduce it for that purpose.

Trial Examiner Eadie: It is relevant to Respondent's position. However, I do more or less agree with Mr. Hill that it is not material; at least in my opinion it doesn't seem material in this case.

However, I will overrule the objection and receive them in evidence as Respondent's Exhibits 3-A, 3-B, and 3-C.

• • • • • • • • • • •

Mr. Beech: Respondent's Exhibit No. 4, marked for identification, is a copy of a letter received by Re-
30 spondent from John E. Lawyer, Chief, Order Section, National Labor Relations Board, Washington, D. C. (Reading)

• • • • • • • • •

I offer that in evidence.

Trial Examiner Eadie: Is there any objection?

31 Mr. Hill: Yes, there is an objection on the ground that what position the Board takes on any disposition of Respondent's request for oral argument in some other cases has no more relevancy here than whether Chicago is the second largest city in the United States or is the third largest city.

Trial Examiner Eadie: I will make the same ruling. I will overrule the objection and receive it in evidence.

• • • • • • • • • • •

Mr. Beech: Respondent rests.

Mr. Hill: The Board has no rebuttal evidence, Mr. Examiner.

Trial Examiner Eadie: Has the Union anything in addition?

Mr. Donovan: No.

Trial Examiner Eadie: Does anybody wish to
32 make any oral argument? Mr. Beech?

Mr. Beech: No.

Trial Examiner Eadie: Mr. Donovan?

Mr. Donovan: No.

Trial Examiner Eadie: Mr. Hill?

Mr. Hill: No, Mr. Examiner.

Trial Examiner Eadie: Do any of the parties wish to submit briefs?

Mr. Beech: We will reserve that right.

Trial Examiner Eadie: If you do wish to submit a brief you must have it in in five days from today, if the hearing closes today.

Mr. Casey: Is it possible for us to submit a brief?

Trial Examiner Eadie: You must have it in in five days.

Mr. Casey: We have no intention at the present time of submitting one.

Mr. Donovan: No, we have not. We have submitted enough now, to hang them, see?

Trial Examiner Eadie: If there is no further evidence, the hearing is closed.

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BOARD'S EXHIBIT No. 2

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

In the matter of
JONES AND LAUGHLIN STEEL CORP., OTIS WORKS,
and
UNITED STEELWORKERS OF AMERICA (CIO).

Case No. R-5143

Mr. Earl F. Blank, of Pittsburgh, Pa. and *Mr. F. W. Mumper*, of Cleveland, Ohio, for the Company.

Mr. William F. Donovan, of Cleveland, Ohio, for the Union.

Mr. David V. Easton, of counsel to the Board.

DECISION AND DIRECTION OF ELECTION

STATEMENT OF THE CASE

Upon petition duly filed by United Steelworkers of America (CIO), herein called the Union, alleging that a question affecting commerce had arisen concerning the representation of employees of Jones & Laughlin Steel Corporation, Otis Works, Cleveland, Ohio, herein called the Company, the National Labor Relations Board provided for an appropriate hearing upon due notice before Louis Plost, Trial Examiner. Said hearing was held at Cleveland, Ohio, on April 8, 1943. The Company and the Union appeared, participated, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. The Company made a motion to dismiss the petition on the ground that a unit of guards is not appropriate. The Trial Examiner referred this motion to the Board. For reasons appearing below this motion is denied. The Trial Ex-

aminer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Company submitted a statement by an official of the Bethlehem Steel Corporation to the House Military Affairs Committee which has been considered by the Board in lieu of a brief.

Upon the entire record in the case, the Board makes the following:

Findings of Fact

I. The business of the Company

Jones & Laughlin Steel Corporation, a Pennsylvania corporation licensed to do business in Ohio, operates plants in Cleveland, Ohio, known as the Otis Works, with which we are concerned herein. The Company is engaged in the manufacture of steel and steel products in various forms. During the year 1942 the raw materials used by the Company and the finished products manufactured by the Company amounted in each instance to more than $1,000,000. In excess of 50 percent of the raw materials and finished products came to the Company and were shipped and sold by the Company from and to points outside the State of Ohio. The Company is engaged in production for the national war effort and admits that it is engaged in commerce within the meaning of the National Labor Relations Act.

II. The organization involved

United Steelworkers of America is a labor organization affiliated with the Congress of Industrial Organizations admitting to membership employees of the Company.

III. The question concerning representation

On February 17, 1943, the Union requested recognition as a bargaining representative of its plant-protection employees. The Company refused to recognize the Union unless it was certified by the Board.

A statement of the Field Examiner, introduced into evidence at the hearing, indicates that the Union represents

a substantial number of employees in the unit hereinafter found appropriate.[1]

We find that a question affecting commerce has arisen concerning the representation of employees of the Company within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

IV. The appropriate unit

The Union contends that all patrolmen, watchmen, and firemen, including dump laborers[2] but excluding lieutenants, captains and supervisors employed at the Otis Works constitute a unit appropriate for the purposes of collective bargaining. The Company maintains that such employees are not an appropriate unit, claiming that these employees should not be permitted to choose a collective bargaining agent since they are either sworn members of the auxiliary military police or under its control. However, the record discloses that although the employees in the proposed unit take the Army oath, they are under the control of the Company as to pay, conditions of employment, and benefits. We have frequently found that plant guards hired and paid by private employers, are employees within the meaning of the Act, and may designate a representative for the purposes of collective bargaining, even though they are members of the auxiliary military police[3] Accordingly, the Company's contention is rejected.

The Union already represents all production and maintenance employees of the Company under a contract dated December 2, 1942, and the employees in the unit

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[1] The Field Examiner reported that the Union submitted 37 designation cards bearing apparently genuine original signatures, of which 34 contained names appearing upon the Company's pay roll of March 2, 1943. This pay roll contained 62 names within the appropriate unit.

[2] The dump laborers as well as the other classifications sought by the Union perform plant-protection work.

[3] *Matter of Westinghouse Air Brake Company* and *United Electrical, Radio & Machine Workers of America, Local No. 610*, 42 N.L.R.B. 525; *Matter of Chrysler Corporation, Highland Park Plant* and *Local 114, United Automobile, Aircraft, and Agricultural Implement Workers of America, affiliated with the C.I.O.*, 44 N.L.R.B. 881; *Curtiss-Wright Corporation* and *American Federation of Labor*, 45 N.L.R.B., No. 86; *William J Burns Detective Agency* and *American Federation of Labor*, 47 N.L.R.B., No. 81.

proposed herein are specifically excluded from the benefits of the above-mentioned contract. However, the Union does not intend to merge the plant-protection employees with the unit for which it has already been recognized as the exclusive bargaining agent, but intends to bargain for them as a separate unit. We have, on several occasions heretofore, permitted the same labor organization to bargain for the production and maintenance employees and the plant-protection employees in separate units.[4]

Accordingly, we find that all patrolmen, watchmen, and firemen, including dump laborers employed by the Company at its Otis Works, but excluding lieutenants, captains, and supervisors, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.[5]

V. The determination of representatives

We shall direct that the question concerning representation which has arisen be resolved by an election by secret ballot among the employees in the appropriate unit who were employed during the pay-roll period immediately preceding the date of our Direction of Election, subject to the limitations and additions set forth therein.

DIRECTION OF ELECTION

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 9, of National Labor Relations Board Rules and Regulations—Series 2, as amended, it is hereby

DIRECTED that, as part of the investigation to ascertain representatives for the purposes of collective bargaining with Jones & Laughlin Steel Corporation, Otis Works,

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[4] *Matter of Phelps Dodge Copper Products Corp.* and *United Electrical, Radio & Machine Workers of America, Local No. 441, affiliated with the Congress of Industrial Organizations*, 41 N.L.R.B. 973; *Chrysler Corporation, Highland Park Plant* and *Local 114, United Automobile, Aircraft, and Agricultural Implement Workers of America, affiliated with the C.I.O.*, 44 N.L.R.B. 881.

[5] *Matter of Chrysler Corporation, Highland Park Plant* and *Local 114, United Automobile, Aircraft, and Agricultural Implement Workers of America, affiliated with the C.I.O., supra.*

Cleveland, Ohio, an election by secret ballot shall be conducted as early as possible, but not later than thirty (30) days from the date of this Direction, under the direction and supervision of the Regional Director for the Eighth Region, acting in this matter as agent for the National Labor Relations Board, and subject to Article III, Section 10, of said Rules and Regulations, among the employees in the unit found appropriate in Section IV, above, who were employed during the pay-roll period immediately preceding the date of this Direction, including any such employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, and including employees in the armed forces of the United States who present themselves in person at the polls, but excluding any who have since quit or been discharged for cause, to determine whether or not they desire to be represented by United Steelworkers of America, affiliated with the Congress of Industrial Organizations, for the purposes of collective bargaining.

Signed at Washington, D. C., this 3rd day of May, 1943.

HARRY A. MILLIS, *Chairman*,
GERARD D. REILLY, *Member*,
JOHN M. HOUSTON, *Member*,
(SEAL) National Labor Relations Board.

BOARD'S EXHIBIT No. 4

Copy to Leo Casey.

May 28, 1943.

Mr. Earl F. Blank
Director of Personnel Relations
Jones & Laughlin Steel Corporation
Pittsburgh, Pa.

Dear Mr. Blank:

Now that we have won a National Labor Relations Board election of guards at your Otis Division, and have been certified as bargaining agency for that group, it is my desire that we begin negotiations for a contract at the earliest possible time.

I shall appreciate hearing from you, giving us a date when a meeting can be arranged to start such negotiations.

Hoping that the meeting may be held at an early date, and with best wishes, I am

Very truly yours,

(s) WILLIAM F. DONOVAN,
District Director.

WFD/b

Copy to Mr. Frank Kovarik
President, Local Union 2915
Cleveland, Ohio.

BOARD'S EXHIBIT No. 5

JONES & LAUGHLIN STEEL CORPORATION

(Letterhead)

June 23, 1943

Mr. William F. Donovan, District Director
United Steelworkers of America
District No. 28
803-804 Chester-Ninth Building
Cleveland, Ohio

Dear Mr. Donovan:

We have your letter of May 28, 1943, requesting that we meet with you, as soon as possible, to commence collective bargaining on behalf of the plant guards at the Otis Works.

As you are well aware, the Corporation objected and still objects to the appropriateness of plant guards as a bargaining unit. Proof of this is to be found in the Statement, dated May 25, 1943, handed each plant guard at the Otis Works. As set forth in that Statement, it is our intention to use every legal means available to us to have plant guards classified with Supervisors in respect to collective bargaining. In accordance with this policy we are obliged to decline your request that we bargain with you on behalf of plant guards.

Very truly yours,

JONES & LAUGHLIN STEEL CORPORATION,
By E. F. BLANK,
Director of Personnel Relations.

WHH:AKK

BOARD'S EXHIBIT No. 6

JONES & LAUGHLIN STEEL CORPORATION

TO ALL PATROLMEN, WATCHMEN, FIREMEN, AND DUMP LABORERS AT THE OTIS WORKS OF JONES & LAUGHLIN STEEL CORPORATION

The National Labor Relations Board has directed that an election be conducted to determine whether *you* men, having the duties of plant guard, desire the United Steelworkers of America to be your exclusive collective bargaining agent.

Jones & Laughlin Steel Corporation has consistently maintained that supervisors and plant guards *should not* be included in bargaining units because both groups represent management in safeguarding the Corporation's property and maintaining order and discipline among its employees.

Because our plant guards, like our supervisors, have been regarded as members of the management's staff, they have been expressly excluded from all our union agreements. Plant guards, as an arm of management, have always been maintained as an effective, responsible, and efficient organization. The responsibilities of plant guard to management are essentially the same as peace officers' duties to the Governor of a State or the Mayor of a City. Management could no more operate efficiently without plant guards responsible solely to it than public officials could operate without their sworn peace officers.

Since ordering the election, in this case, the National Labor Relations Board has ruled that supervisory employes cannot be a bargaining group. It is our intention to use every legal means available to us to secure a similar decision with respect to our plant guards.

In your present capacity as a plant guard, your duties and responsibilities are substantially different from those production and maintenance employes who are covered by the 1942 Agreement between the Jones & Laughlin Steel Corporation and the United Steelworkers of America.

Respondent's Exhibit No. 1

Any plant guard who does not wish to continue as a part of management, who believes his interests require representation, and feels that he is more a part of the production and maintenance group than the management staff, will, upon request, be transferred to an equivalent production or maintenance occupation.

JONES & LAUGHLIN STEEL CORPORATION

Cleveland, Ohio
May 25, 1943

RESPONDENT'S EXHIBIT No. 1

COPY

NATIONAL LABOR RELATIONS BOARD
EIGHTH REGION

Public Square Building
Cleveland, Ohio
August 14, 1943

Jones & Laughlin Steel Corporation, Otis Works
Pittsburgh, Pa.

Attn: Mr. E. F. Blank, Director
of Personnel Relations

Re: Jones & Laughlin Steel
Corporation, Otis Works
Case No. 8-C-1548

Gentlemen:

This will advise you that on August 13, 1943, a charge was filed in the above-entitled case.

The charge alleges, in substance, that the Company has committed violations of Section 8, subsections (1) and (5) of the National Labor Relations Act, by interfering with, restraining, and coercing its employees in their exercise of the rights guaranteed in Section 7 of the Act, and by re-

fusing to bargain with the United Steelworkers of America (CIO) as representatives of all patrolmen, watchmen, and firemen despite the fact that the above-mentioned Union was certified by the National Labor Relations Board on June 5, 1943 as the sole representative of such employees.

This case has been assigned to me for investigation.

The Union has submitted to me a letter under date of June 23, signed by your Company. You state, in substance, that you consider a unit of guards inappropriate and you, therefore, decline to bargain with the certified Union for such class of employees.

Will you please let me know if this is the definite position taken by the Company in this matter. I trust you will give this matter your very prompt attention.

Respectfully yours,

(s) LOUIS PLOST,
Field Examiner.

RESPONDENT'S EXHIBIT No. 2

JONES & LAUGHLIN STEEL CORPORATION

(Letterhead)

September 4, 1943

Mr. Louis Plost, Field Examiner
National Labor Relations Board
Eighth Region
Public Square Building
Cleveland, Ohio

Re: Jones & Laughlin Steel Corporation
Otis Works
Case No. VIII C-1548

Dear Sir:

Referring to our telephone conversation of yesterday, representatives of Jones & Laughlin Steel Corporation

will be pleased to confer with you in your office concerning the charges filed, in the above named case.

Recently, we have had a National Labor Relations Board hearing in a case involving Plant Guards at the Pittsburgh Works of the Corporation and are awaiting a decision in that case.

Therefore, we are deferring an answer with respect to bargaining with representatives of units composed of Plant Guards until such time as a final position of the Corporation has been established.

Yours very truly,

JONES & LAUGHLIN STEEL CORPORATION,
Director of Personnel Relations.

JCB:ade

RESPONDENT'S EXHIBIT No. 3-A

JONES & LAUGHLIN STEEL CORPORATION

(Letterhead)

September 7, 1943

Hon. H. A. Millis, Chairman
National Labor Relations Board
Shoreham Building
Washington, D. C.

Sir:

On August 31, 1943, the National Labor Relations Board upon petition of the United Steelworkers of America, held a hearing in Pittsburgh, Pennsylvania, involving Plant Guards of the Pittsburgh Works of Jones & Laughlin Steel Corporation. The Corporation moved to dismiss

the Petition because the Petitioner is the same labor organization that represents production and maintenance employes in all of its steel plants, including the Pittsburgh Works, and in the 1942 Agreement between the Corporation and the Union, now in force, watchmen or guards are specifically excluded, together with foremen, salaried employes and nurses.

Plant Guards of the Pittsburgh Works of Jones & Laughlin Steel Corporation are engaged in protecting a $200,000,000 steel plant engaged in 100% war production. The operation of this plant is just as vital as the production of navy planes at the Johnsville Plant of Brewster Aeronautical Corporation, where a recent work stoppage occurred, occasioned by plant guards holding their union rights paramount to allegiance to the U. S. Coast Guard Reserve, and subsequent support by their fellow union production workers in the same union. It is conceivable that a similar situation might arise in the Pittsburgh Works of the Corporation.

The Corporation has given serious consideration to testing the appropriateness of a unit composed of Plant Guards in the U. S. Circuit Court of Appeals. However, corporate officials feel that they would like to have the benefit of oral argument before the Board and some discussion with Board members themselves prior to making a definite decision with regard to bargaining with certified representatives of Plant Guards.

Therefore, will you please consider this as a request for oral hearing before the Board and a further request that you as an individual Board member, grant representatives of the Corporation opportunity for discussion with you.

Respectfully yours,

JONES & LAUGHLIN STEEL CORPORATION,

Director of Personnel Relations.

JCB:ade

RESPONDENT'S EXHIBIT No. 4

COPY

NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D. C.

H. A. MILLIS,
Chairman
GERARD D. REILLY
JOHN M. HOUSTON

September 11, 1943

Mr. Earl F. Blank
Director of Personnel Relations
Jones & Laughlin Steel Corp.
Pittsburgh, Pennsylvania

Re: Jones & Laughlin Steel Corp.
Case No. 6-R-770

Dear Mr. Blank:

This will acknowledge receipt of your letter of September 7, addressed to Dr. Millis.

Your request for permission to present oral argument has been referred to the Board for consideration. You will be advised of the action taken at a later date.

Very truly yours,

(s) JOHN E. LAWYER,
Chief, Order Section.

INTERMEDIATE REPORT

(Dated October 5, 1943)

Mr. John Robert Hill, for the Board.

Mr. James C. Beech, of Pittsburgh, Pa., for the respondent.

Mr. William F. Donovan and *Mr. Leo F. Casey*, of Cleveland, Ohio, for the Union.

Statement of the Case

Upon a first amended charge duly filed on September 11, 1943, by United Steelworkers of America (CIO), herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the Eighth Region (Cleveland, Ohio), issued its complaint, dated September 16, 1943, against Jones & Laughlin Steel Corporation, herein called the respondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. Copies of the complaint accompanied by notice of hearing were duly served upon the respondent and the Union.

With respect to the unfair labor practices the complaint alleged in substance: (1) that on May 3, 1943, the Board in its Decision and Direction of Election in Case No. R-5143[1] found that all patrolmen, watchmen, and firemen, including dump laborers, employed by the respondent at its Otis Works, Cleveland, Ohio, but excluding lieutenants, captains, and supervisors, constituted a unit appropriate for collective bargaining; (2) that a majority of the employees in the aforesaid appropriate unit designated and selected the Union as their representative for the purposes of collective bargaining at an election conducted by the Board on May 26, 1943; (3) that on June 5, 1943, the Board certified the Union as the exclusive representative of all employees in said unit for the purposes of collective bargaining; (4) that the Union at all times since said cer-

[1] *Matter of Jones & Laughlin Corporation* and *United Steelworkers of America (CIO)*.

tification has been, and continues to be, the exclusive representative of all employees in said appropriate unit; (5) that on or about May 28, 1943, and at all times thereafter, the Union requested the respondent to bargain collectively; (6) that the respondent since on or about June 23, 1943, and at all times thereafter, has failed and refused to bargain with the Union; and (7) that by such refusal, the respondent interfered with, restrained, and coerced its employees in the rights guaranteed in Section 7 of the Act.

On or about September 24, 1943, the respondent filed an answer, admitting certain allegations of the complaint as to its business, and as to certain proceedings of the Board leading to the certification of the Union. In its answer, however, the respondent denied the commission of the alleged unfair labor practices, denied the appropriateness of the unit as found by the Board in Case No. R-5143, and denied that it has failed and refused to bargain with the Union, stating that its refusal to bargain was "qualified and conditional".

Pursuant to notice, a hearing was held on September 28, 1943, at Cleveland, Ohio, before the undersigned Trial Examiner, duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel, and the Union by its representatives. All parties participated in the hearing. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues was afforded all parties. Although afforded an opportunity to do so, none of the parties argued orally before the undersigned or filed briefs with him.

Upon the entire record in the case, the undersigned makes the following:

Findings of Fact

I. The business of the respondent

Jones & Laughlin Steel Corporation is a Pennsylvania corporation engaged in the manufacture of iron and steel products. It operates steel mills in Pittsburgh, Aliquippa, and McKeesport, Pennsylvania, and Cleveland, Ohio. The instant case is concerned only with the steel mills located

at Cleveland, Ohio, known as the Otis Works. The Otis Works consists of two plants, known as the Riverside plant, employing approximately 3,200 employees, and the Lakeside plant, employing approximately 1,500 employees.

With respect to the operations of the Otis Works, the respondent during the year 1942, used coal, limestone, iron ore and other raw materials with a value in excess of $1,000,000, approximately 50 percent of which came from points outside the State of Ohio. During the year 1942, the respondent manufactured at the Otis Works approximately 1,000,000 tons of ingot steel, in excess of 50 percent of which was shipped to points outside the State of Ohio.

At the hearing, the respondent admitted that it is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

II. The organization involved

United Steelworkers of America (CIO) is a labor organization which admits to membership employees of the respondent.

III. The unfair labor practices

The refusal to bargain

1. The appropriate unit and representation by the Union of a majority therein

On May 3, 1943, the Board issued a Decision and Direction of Election (Case No. R-5143) finding, among other things, that all patrolmen, watchmen, and firemen, including dump laborers, employed by the respondent at its Otis Works, but excluding lieutenants, captains, and supervisors, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

On May 26, 1943, an election was held pursuant to said Direction of Election. On June 5, 1943, the Board certified the Union as the representative of the employees in the unit heretofore mentioned, for the purposes of collective bargaining.

At the hearing the respondent did not question the fact

that the Board had certified the Union as the representative of its employees, but contested the appropriateness of the unit and the subsequent certification of the Union. The respondent did not adduce any evidence on the question of the appropriateness of the unit, or to rebut the presumption arising from the Board's certification that the Union is still the representative of the majority of the employees of the respondent in the appropriate unit.[2]

The undersigned finds, in accordance with the Board's previous determination, that all patrolmen, watchmen, and firemen, including dump laborers, employed by the respondent at its Otis Works, but excluding lieutenants, captains and supervisors, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act. The undersigned further finds that on and at all times after June 5, 1943, the Union was the duly designated bargaining representative of a majority of the employees in the aforesaid appropriate unit, and that, pursuant to the provision of Section 9 (a) of the Act, the Union was on June 5, 1943, and at all times thereafter has been and is now the exclusive representative of all employees in the aforesaid unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

2. The refusal to bargain

In a letter dated May 28, 1943, the Union requested respondent to bargain collectively with it as the exclusive representative of the employees in the unit. On June 23, 1943, the respondent sent the Union the following letter:[3]

> We have your letter of May 28, 1943, requesting that we meet with you, as soon as possible, to commence collective bargaining on behalf of the plant guards at the Otis Works.
>
> As you are well aware, the Corporation objected and still objects to the appropriateness of plant guards as

[2] None of the parties produced witnesses at the hearing and the evidence consists wholly of exhibits, stipulations and admissions of counsel.

[3] As noted above, the Board's certification is dated June 5, 1943.

a bargaining unit. Proof of this is to be found in the Statement, dated May 25, 1943, handed each plant guard at the Otis Works. As set forth in that Statement, it is our intention to use every legal means available to us to have plant guards classified with Supervisors in respect to collective bargaining. In accordance with this policy we are obliged to decline your request that we bargain with you on behalf of plant guards.

An agent for the Board, by letter dated August 14, 1943, referred to the respondent's refusal to bargain with the Union as set forth in respondent's letter of June 23, 1943, and inquired if this was the "definite position taken by the Company". On September 4, 1943, the respondent sent the Board agent the following letter:

> Referring to our telephone conversation of yesterday, representatives of Jones & Laughlin Steel Corporation will be pleased to confer with you in your office concerning the charges filed, in the above named case.
>
> Recently, we have had a National Labor Relations Board hearing in a case involving Plant Guards at the Pittsburgh Works of the Corporation and are awaiting a decision in that case.
>
> Therefore, we are deferring an answer with respect to bargaining with representatives of units composed of Plant Guards until such time as a final position of the Corporation has been established.

During the hearing, the respondent's counsel made the following statements concerning the respondent's position on its willingness to bargain with the Union:

> Mr. Hill: Is the present position of Respondent Corporation one of agreeing to bargain with the Union of this date or wanting to think it over until some further and unspecified date?
>
> Mr. Beech: Yes. I might state that Respondent hasn't taken a definite position as of this date.
>
> Trial Examiner Eadie: In other words, it is the Re-

spondent's position as of this date that it is still not ready to say that it is willing to bargain with the Union?

Mr. Beech: It is not prepared to say it will or will not, at this time, Mr. Examiner.

Mr. Hill: In other words, Respondent Corporation desires and will take time to think this matter over.

Mr. Beech: That is true.

Trial Examiner Eadie: At any rate, as of today the Respondent is not prepared to say that it will bargain with the Union.

Mr. Beech: That's true.

The undersigned finds that the respondent on June 23, 1943, and at all times thereafter, has refused to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit, and has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.[4]

IV. The effect of the unfair labor practices upon commerce

The activities of the respondent set forth in Section III above, occuring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce, among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Since it has been found that the respondent has engaged in unfair labor practices, it will be recommended that it

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[4] The respondent contends that its refusal to bargain is "qualified and conditional and not final and conclusive." This contention is based on respondent's claim of the inappropriateness of the unit as found by the Board and, further, on the fact that the respondent was awaiting a decision in a case before the Board involving "Plant Guards at the Pittsburgh Works." (Referred to in respondent's letter dated September 4, 1943, to the Board's agent, as noted above). The undersigned does not find any merit in the respondent's contention in this connection.

cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Since it has been found that the respondent has refused to bargain collectively with the Union as the exclusive representative of its employees in an appropriate unit, it will be recommended that the respondent, upon request, bargain collectively with the Union.

Upon the basis of the above findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. United Steelworkers of America (CIO) is a labor organization, within the meaning of Section 2 (5) of the Act.

2. All patrolmen, watchmen, and firemen, including dump laborers, employed by the respondent at its Otis Works, Cleveland, Ohio, but excluding lieutenants, captains and supervisors, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.

3. United Steelworkers of America (CIO) was on June 5, 1943, and at all times thereafter, has been the exclusive representative of all employees in the aforesaid unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.

4. By refusing on June 23, 1943, and at all times thereafter, to bargain collectively with the United Steelworkers of America (CIO), as the exclusive representative of all its employees in the aforesaid appropriate unit, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor

practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the above findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that the respondent, Jones & Laughlin Steel Corporation, and its officers, agents, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Steelworkers of America (CIO) as the exclusive representative of all its employees employed as patrolmen, watchmen, and firemen, including dump laborers, employed by the respondent at its Otis Works, but excluding lieutenants, captains and supervisors;

(b) Engaging in any like or related act or conduct interfering with, restraining, or coercing its employees in the exercise of the rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with United Steelworkers of America (CIO) as the exclusive representative of all of its employees in the aforesaid appropriate unit;

(b) Post immediately in conspicuous places at its Otis Works plants in Cleveland, Ohio, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is recommended that it cease and desist in paragraph 1 (a) and (b) of these recommendations, and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of these recommendations;

(c) Notify the Regional Director for the Eighth Region in writing, within ten (10) days from the date of the receipt of this Intermediate Report, what steps the respondent has taken to comply herewith.

It is further recommended that unless on or before ten (10) days from the receipt of this Intermediate Report, the respondent notifies said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 2—as amended, effective October 28, 1943—any party may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceedings (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. As further provided in said Section 33 should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days from the date of the order transferring the case to the Board.

Dated: October 5, 1943

JOHN H. EADIE,
Trial Examiner.

EXCEPTIONS AND OBJECTIONS TO INTERMEDIATE REPORT FILED ON BEHALF OF JONES & LAUGHLIN STEEL CORPORATION

(Dated November 4, 1943)

Jones & Laughlin Steel Corporation (hereinafter referred to as the respondent) by its representative, W. H. Harvey, files this, its bill of exceptions and objections to the Intermediate Report of John H. Eadie (sometimes hereinafter referred to as the Examiner), said Intermediate Report having been served upon respondent on October 11, 1943. Respondent excepts and objects to the findings of fact, conclusions of law, the remedy and recommendations as follows:

1. Respondent excepts to that portion of the Intermediate Report that would require respondent to cease and desist from:

> 1.(a) *Refusing to bargain collectively with United Steelworkers of America (CIO) as the exclusive representative of all its employees employed as patrolmen, watchmen, and firemen, including dump laborers, employed by the respondent at its Otis Works, but excluding lieutenants, captains, and supervisors.*

take the following affirmative action

> 2(a) *Upon request, bargain collectively with United Steelworkers of America (CIO) as the exclusive representative of all of its employees in the aforesaid appropriate unit: . . .*

and that conclusion of law holding that

> 2. *All patrolmen, watchmen, and firemen, including dump laborers, employed by the respondent at its Otis Works, Cleveland, Ohio, but excluding lieutenants, captains, and supervisors, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act*

National Labor Relations Act—Definitions Section 2. When used in this Act. (*2*) *The term "employer" includes any person acting in the interest of an employer, directly*

or indirectly[1] but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

Inasmuch as a corporation can act only through individuals, all of whom are employes of the corporation, such employes acting in that capacity are deemed to be within Section 2 (2) of the Act. The plant guards at the Otis Works of the Corporation represent management by enforcing the rules and regulations of the Corporation, protecting corporate property, and making confidential investigations for the Corporation and various governmental agencies. Hence, any construction of the Act that would make a finding that plant guards are employees within the meaning of Section 2 (3) of the Act, would in effect deprive management of a class of those employees who can and do properly act in the interest of the employer.

Plant guards do not constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act for the reasons that they are not employees within the meaning of Section 2 (3) of the Act and such a finding does not effectuate the policies of the Act. Rather, the conclusion of law hampers the purposes of the Act and has a tendency to defeat true and bona fide collective bargaining. Plant guards, who are civilian auxiliaries to the military police, are confronted with mixed questions of duty, allegiance and responsibility to the U. S. Government, employer and labor organization. In the matter of The Maryland Drydock Company and Local No. 31 of the Industrial Union of Marine and Shipbuilding Workers of America, Cases No. R-5212 and 5214, the Board held that supervisory employers do not constitute a unit appropriate for the purposes of collective bargaining saying . . . "The provisions of Section 9 (b) which render it incumbent upon the Board to consider whether the unit alleged to be appropriate in each case

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[1] Italics supplied.

will insure to employees the full benefit of their right to self-organization and to collective bargaining and *otherwise effectuate the policies of the Act* (italics supplied). In making this determination it is relevant for us to inquire into the status in the managerial hierarchy of the personnel claiming to be an appropriate unit." It is submitted that plant protection employees like supervisory employees exercise a degree of control and supervision over production workers in that they have supervision with respect to policing such personnel and enforcing the Corporation rules and regulations as well as the General Orders imposed by the U. S. Army on War Production Plants and personnel. Although the authority inherent in the plant guards does not extend to the power of hiring and discharging production and maintenance employees, the dominant factor of control over such personnel, i. e., enforcing Corporation's rules and regulations with respect to conduct of employees and protection of plant property is supervision akin to that exerted by foremen and lesser supervisory employees, in that, within the limits of their authority, their recommendations with respect to hiring and firing are given the same serious consideration as the recommendations of supervisors. Plant guards like supervisors of the Corporation have always been regarded as members of Management's Staff and have been expressly excluded from labor agreements negotiated between the Corporation and various labor organizations. The responsibilities of plant guard to Management are essentially the same as peace officers' duties to the governor of a state or the mayor of a city. Management can no more operate efficiently without plant guards responsible solely to it than public officials can function without their sworn peace officers. The conclusion of law holding that plant guards constitute an appropriate unit within the meaning of Section 9 (b) exceeds the administrative discretion of the Board.

2. Respondent excepts to that portion of the Intermediate Report that would require respondent to cease and desist from

1(b) ***Engaging in any like or related act or conduct interferring with, restraining, or coercing its employees in the exercise of the rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.***

and that conclusion of law holding that respondent

5. ***By interferring with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.***

The conclusion of law and proposed Board Order recommended by the Examiner are not supported by any evidence in the record or any finding of fact upon which to base such a conclusion and recommendation. Respondent challenges Board or Union to submit any instance wherein any representative of the Corporation has singly or collectively interferred with plant guards or been guilty of the type coercion practiced by Union to secure members.

3. Respondent excepts to that conclusion of law made by the Examiner as follows:

3. ***United Steelworkers of Amerita (CIO) was on June 5, 1943, and at all times thereafter, has been the exclusive representative of all employees in the aforesaid unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act***

The Board exceeded its powers and erred in finding that a question affecting commerce had arisen concerning employees under Section 9(c) of the Act and proceeded to make an illegal, arbitrary and capricious determination of an alleged appropriate unit under Section 9(b) of the Act. Therefore, the representatives so certified pursuant to Section 9(a) are representatives of employes in an inappropriate unit and said certification has no legal force

and effect under the Act. The Examiner's conclusion of law is based wholly thereon.

4. Respondent excepts to that conclusion of law made by the Examiner

> 4. *By refusing on June 23, 1943, and at all times thereafter, to bargain collectively with the United Steelworkers of America (CIO) as the exclusive representative of all its employees in the aforesaid appropriate unit, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act.*

The Examiner predicates his conclusion of law upon a finding of fact that respondent has refused to bargain with representatives of employees in an alleged appropriate unit; inasmuch as said finding is based upon the Board's prior erroneous determination of an inappropriate unit, respondent's refusal to bargain is not an unfair labor practice within the meaning of Section 8(5) of the Act.

5. Respondent excepts to that recommendation of the Examiner that would require respondent to

> 2(b) *Post immediately in conspicuous places at its Otis Works plants in Cleveland, Ohio, and maintain for a period of at least sixty (60) consecutive days, from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is recommended that it cease and desist in paragraph 1 (a) and (b) of these recommendations, and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of these recommendations.*

The recommendation and proposed order are unjustified and beyond lawful power of the Board. The recommended posting of the aforesaid notices is not within the spirit or letter of the Act and would in no wise effectuate the policies of the Act. The aforesaid recommendation, if posted as ordered, would serve only to create confusion and discord among production workers who are not involved in

this issue. Same also signifies to us the lack of knowledge and bias on part of Examiner in that any fair person would, at most, recommend posting only in places where it is the habit, custom or requirement of plant guards to gather.

6. Respondent excepts to the conclusion of law made by the Examiner holding that

> 6. *The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.*

The conclusion of law made by the Examiner is not supported by any evidence in the record or finding of fact to substantiate such a conclusion.

CONCLUSION

For the reasons hereinbefore set forth respondent

(1) Moves that the complaint and first amended charge be dismissed and

(2) Petitions the Board to issue an order revoking the certification of representatives made in Case No. R-5143.

Respectfully submitted,

JONES & LAUGHLIN STEEL CORPORATION,
By W. H. HARVEY.

Dated November 4, 1943.

DECISION AND ORDER

(Signed December 2, 1943)

On October 5, 1943, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the respondent filed exceptions and objections to the Intermediate Report. The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the respondent's exceptions and objections, and the entire record in the case, and hereby adopts the findings, conclusions and recommendations made by the Trial Examiner, with the additions noted below.

In its exceptions to the Intermediate Report, the respondent reiterates its contention that a unit of guards is not appropriate within the meaning of the Act, petitions that the Board's certification of the Union as the collective bargaining representative of the employees in such a unit be revoked, and moves that the complaint accordingly be dismissed. The petition and the motion are hereby denied. The respondent has advanced no argument in support of its contentions which we have not considered and rejected in previous decisions holding that plant-protection employees may constitute appropriate units for collective bargaining under the Act.[1]

The respondent further excepts to the recommendation of the Trial Examiner that it be required to post appropriate notices "in conspicuous places at its Otis Works plants," contending that the posting of such notices should be confined to the guards' quarters. We are in accord with the Trial Examiner's recommendation, and we find that the purposes of the Act will be better effectuated by a

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[1] See *Matter of Budd Wheel Company*, 52 N.L.R.B., No. 115, and cases cited therein; *Matter of Jones & Laughlin Steel Corporation*, 52 N.L.R.B., No. 169.

general posting of notices, rather than by a posting limited to the guards' quarters.

ORDER

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Jones & Laughlin Steel Corporation, Cleveland, Ohio, and its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Steelworkers of America (CIO) as the exclusive representative of all patrolmen, watchmen, and firemen, including dump laborers, employed by the respondent at its Otis Works, but excluding lieutenants, captains, and supervisors;

(b) Engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with United Steelworkers of America (CIO) as the exclusive representative of all patrolmen, watchmen, and firemen, including dump laborers, employed by the respondent at its Otis Works, but excluding lieutenants, captains, and supervisors;

(b) Immediately post in conspicuous places throughout its Otis Works plants in Cleveland, Ohio, including the premises occupied by its patrolmen, watchmen, firemen, and dump laborers, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered

to cease and desist in paragraphs 1 (a) and (b) of this Order; and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of this Order;

(c) Notify the Regional Director for the Eighth Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

Signed at Washington, D. C., this 2nd day of December, 1943.

HARRY A. MILLIS, *Chairman*,
GERARD D. REILLY, *Member*,
JOHN M. HOUSTON, *Member*,
National Labor Relations Board.

(SEAL)

In the United States Circuit Court of Appeals

For the Sixth Circuit

NATIONAL LABOR RELATIONS BOARD
Petitioner,

vs.

JONES & LAUGHLIN STEEL CORPORATION,
Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

(Signed January 28, 1944)

The National Labor Relations Board by its Chief of the Order Section, duly authorized by Section 1 of Article VI, Rules and Regulations of the National Labor Relations Board, Series 3, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record in proceedings before said Board entitled, "In the Matter of Jones & Laughlin Steel Corporation and United Steelworkers of America (CIO)," and "In the Matter of Jones & Laughlin Steel Corporation, Otis Works and United Steelworkers of America (CIO)," the same being Cases Nos. 8-C-1548 and R-5143, respectively, before said Board, such transcript including the pleadings, testimony, and evidence upon which the order of the Board in said proceedings was entered, and including the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

R-5143 (8-R-1056)

(1) Stenographic transcript of testimony held before Louis Plost, Trial Examiner for the National Labor Re-

lations Board, together with all exhibits introduced into evidence.

(2) Copy of decision and direction of election issued by the National Labor Relations Board May 3, 1943, together with affidavit of service.

(3) Copy of Regional Director's report on ordered election dated May 27, 1943.

(4) Copy of certification of representatives issued by the National Labor Relations Board June 5, 1943, together with affidavit of service.

8-C-1548

(5) Stenographic transcript of testimony held before John H. Eadie, Trial Examiner for the National Labor Relations Board, together with all exhibits introduced into evidence.

(6) Copy of Trial Examiner Eadie's Intermediate Report, dated October 5, 1943.

(7) Copy of order transferring case to the Board, dated October 9, 1943.

(8) Copy of respondent's exceptions to the Trial Examiner's Intermediate Report, dated November 4, 1943.

(9) Copy of decision and order issued by the National Labor Relations Board December 2, 1943, with Trial Examiner's Intermediate Report annexed, together with affidavit of service and United States Post Office return receipts thereof.

IN TESTIMONY WHEREOF the Chief of the Order Section of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 28th day of January, 1944.

JOHN E. LAWYER, *Chief*,
Order Section,
(SEAL) National Labor Relations Board.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Filed February 1, 1944)

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U.S.C. § 151 *et seq.*), respectfully petitions this Court for the enforcement of its order against respondent, Jones & Laughlin Steel Corporation, Cleveland, Ohio, and its officers, agents, successors and assigns. The proceedings resulting in said order are known upon the records of the Board as "In the Matter of Jones & Laughlin Steel Corporation and United Steelworkers of America (CIO), Case No. 8-C-1548" and "In the Matter of Jones & Laughlin Steel Corporation, Otis Works and United Steelworkers of America (CIO), Case No. R-5143."

In support of this petition the Board respectfully shows:

(1) Respondent is a Pennsylvania corporation, engaged in business in the State of Ohio, within this judicial circuit, where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof, certified by the Board and filed with this Court herein, to which reference is hereby made, the Board, on December 2, 1943, duly issued an order directed to respondent, and its officers, agents, successors and assigns. The aforesaid order provides as follows:

ORDER

Upon the entire record in the case and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Jones & Laughlin Steel Corporation, Cleveland, Ohio, and its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Steelworkers of America (CIO) as the exclusive representative of all patrolmen, watchmen, and firemen, including dump laborers, employed by the respondent at its Otis Works, but excluding lieutenants, captains, and supervisors;

(b) Engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with United Steelworkers of America (CIO) as the exclusive representative of all patrolmen, watchmen, and firemen, including dump laborers, employed by the respondent at its Otis Works, but excluding lieutenants, captains, and supervisors;

(b) Immediately post in conspicuous places throughout its Otis Works plants in Cleveland, Ohio, including the premises occupied by its patrolmen, watchmen, firemen, and dump laborers, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a) and (b) of this Order; and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of this Order;

(c) Notify the Regional Director for the Eighth Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

(3) On December 2, 1943, the Board's decision and order was served upon respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to James C. Beech, Esquire, respondent's attorney in Pittsburgh, Pennsylvania.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, the Board is certifying and filing with this Court a transcript of the entire record in the proceedings before the Board, including the pleadings, testimony and evidence, and order of the Board.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole said order of the Board, and requiring respondent, and its officers, agents, successors and assigns to comply therewith.

NATIONAL LABOR RELATIONS BOARD,
(s) HOWARD LICHTENSTEIN,
Assistant General Counsel.

Dated at Washington, D. C.,
this 28th day of January, 1944.

DISTRICT OF COLUMBIA, ss:

Howard Lichtenstein, being first duly sworn, states that he is Assistant General Counsel of the National Labor Relations Board, petitioner herein, and that he is authorized to and does make this verification in behalf of said Board; that he has read the foregoing petition and has knowledge of the contents thereof; and that the statements made therein are true to the best of his knowledge, information and belief.

(s) HOWARD LICHTENSTEIN,
Assistant General Counsel.

Subscribed and sworn to before me this ..... day of January, 1944.

(SEAL) (s) JOHN E. LAWYER, *Notary Public*, District of Columbia.

My commission expires August 31, 1944.

DESIGNATION BY THE NATIONAL LABOR RELATIONS BOARD OF PORTIONS OF THE RECORD TO BE PRINTED

(Filed February 1, 1944)

Comes now the National Labor Relations Board, petitioner herein, and, in conformity with the rules of this Court, designates the following portions of the transcript of the proceedings, the exhibits, and other papers of record herein to constitute the printed record before the Court:

I. Case No. 8-C-1548:

FROM		THROUGH	
PAGE	LINE	PAGE	LINE
1	1	1	21
8	11	10	10
13	7	14	21
15	24	16	2
16	19	18	1
23	7	25	17
26	3	26	6
26	14	26	24
28	24	29	3

Print the following documents:

(a) Boards Exhibits:

1-C, 1-D, 1-F, 2, 4, 5, 6;

(b) Respondent's exhibits:
1, 2, 3-A;

(c) Board's Decision and Order, dated December 2, 1943;

(d) Trial Examiner's Intermediate Report; dated October 5, 1943;

(e) Respondent's Exceptions to Trial Examiner's Intermediate Report.

II. Case No. R-5143:

FROM		THROUGH	
PAGE	LINE	PAGE	LINE
1	1	1	21
10	14	11	23
12	3	18	8
18	14	25	17
28	6	29	12
29	18	30	18
31	1	31	22

Print the following documents:

(a) BOARD EXHIBIT:
1 (print the Petition for Investigation and Certification of Representatives only);

(b) Report on Ordered Election dated May 27, 1943;

(c) Certification of Representatives dated June 5, 1943;

(d) Petition for enforcement and respondent's answer thereto;

(e) This designation of record.

(s) HOWARD LICHTENSTEIN,
Assistant General Counsel,
National Labor Relations Board.

Dated at Washington, D. C.,
this 28th day of January, 1944.

DESIGNATION BY RESPONDENT JONES & LAUGHLIN STEEL CORPORATION OF ADDITIONAL PORTIONS OF THE TRANSCRIPT TO BE INCLUDED IN THE PRINTED RECORD

(Filed February 18, 1944)

And Now, to-wit, this 17th day of February, 1944, comes Jones & Laughlin Steel Corporation, respondent in the above entitled case, and in conformity with the Rules of this Court, designates the following portions of the transcript to be added to those heretofore designated by the National Labor Relations Board, petitioner, to be included in the printed record before the Court:

I. Case No. R-5143:

Excerpts from typewritten transcript of testimony:

FROM		THROUGH	
PAGE	LINE	PAGE	LINE
6	15	6	18
7	5	7	20
8	11	10	13
25	18	28	5
30	19	30	24
31	23	33	20

Also print the following document:

C. I. O. Exhibit No. 1.

II. Case No. 8-C-1548:

Excerpts from typewritten transcript of testimony:

FROM		THROUGH	
PAGE	LINE	PAGE	LINE
5	10	5	13
6	4	8	10
11	15	13	6
14	22	14	23
15	4	15	6
16	13	16	15
18	2	18	26
20	11	21	18

Respondent's Designation

FROM		THROUGH	
PAGE	LINE	PAGE	LINE
22	21	23	6
25	18	25	24
26	25	27	8
29	4	29	21
30	11	30	14
31	6	31	14
31	21	32	22

Also print the following document:

Respondent's Exhibit No. 4.

III. This designation of additional portions of the record.

Respondent respectfully suggests that in the printed record, the documents and testimony should be arranged as nearly as possible in chronological order.

(s) JOHN C. BANE, JR.,
(s) REED, SMITH, SHAW & MCCLAY,
Attorneys for Respondent,
JONES & LAUGHLIN STEEL CORPORATION.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Cause argued and submitted

(October 16, 1944)

Before HICKS, SIMONS, and ALLEN, Circuit Judges

This cause is argued by F. J. Donner for Petitioner, by John C. Bane for Respondent, and by T. R. Iserman for Chyrsler Corporation as amicus curiae, and is submitted to the court.

Judgment

(Entered December 8, 1944)

On petition for enforcement of an order of the National Labor Relations Board.

This cause came on to be heard on the transcript of record from the National Labor Relations Board, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this court that the petition for enforcement of the order of the said Board be and the same is hereby denied.

Opinion

(Filed December 8, 1944)

Nos. 9730 and 9769

United States Circuit Court of Appeals, Sixth Circuit

No. 9730

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JONES & LAUGHLIN STEEL CORPORATION, RESPONDENT

No. 9769

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FEDERAL MOTOR TRUCK COMPANY, RESPONDENT

On Petition for Enforcement of Orders of the National Labor Relations Board

Decided December 8, 1944

Before HICKS, SIMONS, and ALLEN, Circuit Judges

HICKS, Circuit Judge. For these cases one opinion will suffice. No jurisdictional question is involved.

In the Jones & Laughlin case, No. 9730, the petitioner, herein called the Board, seeks the enforcement of an order directing respondent to bargain collectively with United Steel Workers of America (C. I. O.), herein called the Union, as the exclusive representative of all its patrolmen, watchmen, firemen, including "dump laborers," herein called plant protection employees, employed by respondent at its Otis Works, but excluding lieutenants, captains, and supervisors. There is included in the membership of this Union, not only plant protection employees, but production employees as well.

In the Federal Motor Truck Company case, No. 9769, the Board seeks the enforcement of an order directing respondent to bargain collectively with Amalgamated Plant Protection Local No. 114, U. A. W. (C. I. O.), herein called the Union, as the exclusive representative of all its plant protection employees at its three Detroit plants, excluding the plant engineer, the assistant chief of plant protection, and all supervisory employees.

The enforcement of the orders is resisted by respondents.

These orders were based upon records made before trial examiners, including results of elections held by direction of the Board, in which the majority of the plant protection employees, in each case, selected the Unions indicated, as their exclusive representatives for the purpose of collective bargaining with respect to rates of pay, wages, hours, and other conditions of employment. In each case the Board affirmed the reports of intermediate examiners to the effect that the employees classified as "plant protection employees" constituted appropriate units for the purpose of collective bargaining within the meaning of Sec. 9 (a) and (b) of the National Labor Relations Act.

By subdivision (b) the duty of determining the unit of employees appropriate for the purpose of collective bargaining is placed specifically and exclusively upon the Board. Pittsburgh Plate Glass Co. v. Board, 313 U. S. 146, 152. But the Board's authority in making such determination is not an absolute one—it must be exercised within the permissible limits of administrative discretion and whether it did so in these cases is the principal question for review. Marlin-Rockwell Corp. v. N. L. R. B., 116

Fed. (2d) 586, 587 (C. C. A. 2); N. L. R. B. v. Delaware-New Jersey F. Co., 128 Fed (2d) 130, 137 (C. C. A. 3); N. L. R. B. v. Botany Worsted Mills, 133 Fed. (2d) 876, 880 (C. C. A. 3).

In determining an appropriate unit for collective bargaining, the Board is required by Sec. 9 (b) to consider whether its order will insure employees the full benefit of their rights to self-organization and collective bargaining, and this involves the inquiry as to who are "employees," or to be more specific, whether "plant protection employees" are entitled to the benefits of the Act. Here, the Board must give consideration to Sec. 2 (2) and (3). Subdivision (3) provides that "the term 'employee' shall include any employee * * *," but subdivision (2) provides that the "term 'employer' includes any person acting in the interest of an employer directly or indirectly * * *."

Plant protection employees are "employees" when considered in their relationships to their employer [N. L. R. B. v. Skinner & Kennedy S. Co., 113 Fed. (2d) 667, 671 (C. C. A. 8)] but we find it difficult to determine that they are "employers" when their relationship to their fellow employees is considered. However, under the facts pertaining to their duties as hereinafter set forth, we are unable to say that the Board exceeded the limits of its discretion in determining that plant protection employees are entitled to the protection of the Act. We think that, in determining this question, the Board properly accepted for its guidance the underlying economic facts of the cases in hand. Board v. Hearst Publications, 322 U. S. 111, 129; N. L. R. B. v. Blount, 131 Fed. (2d) 585, 590 (C. C. A. 8); N. L. R. B. v. Gluek Brewing Co., 144 Fed. (2d) 847, 855 (C. C. A. 8).

The question as to who are employers or employees under the Act is usually presented in cases where some person or agency acting either directly or indirectly for the employer interferes or seeks to interfere with the rights of employees to organize. I. A. of M. v. Labor Board, 311 U. S. 72; N. L. R. B. v. Taylor-Colquitt Co., 140 Fed. (2d) 92 (C. C. A. 4). That situation is not presented here.

Nevertheless the Board could not stop with its finding upon the facts that plant protection employees are entitled to the benefits of collective bargaining. It is required under Sec. 9 (b) to go further and determine whether the unit or units selected for that purpose would effectuate "the policies of Sec. 151–166 of this Title * * *." In both cases respondents concede, as they must concede [Pittsburgh P. Glass Co. v. Board, supra] that the Board had wide discretion in determining whether the units selected were appropriate, and if so, whether their selection effectuated the policies of the Act. But each respondent has insisted from the beginning, and now insists, that in making such determinations

the Board went clearly beyond the limits of its discretion. If this it true, the orders are invalid as a matter of law. Pittsburgh P. Glass Co. v. N. L. R. B., 113 Fed. (2d) 698, 701 (C. C. A. 8), affirmed 313 U. S. 146, 152; Midland Steel Products Co. v. N. L. R. B., 113 Fed. (2d) 800, 805 (C. C. A. 6).

We are confronted with a preliminary inquiry into the nature of the policies of the Act. Thes are set forth in its preamble [Title 29, Sec. 151 U. S. C. A.] and we need not repeat them. It is sufficient to say that the fundamental purposes of the Wagner Act are to eliminate and prevent obstructions to the free flow of interstate commerce [Labor Board v. Fansteel Corp., 306 U. S. 249, 257] and that in its administration, the Board acts in a public capacity and in the public interest.

In National Licorice Co. v. Labor Board, 309 U. S. 350, at page 362, the court said:

"The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights. Amalgamated Utility Workers v. Consolidated Edison Co., ante, p. 261; H. Rept. No. 1147, 74th Cong., 1st Sess., Committee on Labor, p. 24; cf. Federal Trade Commission v. Klesner, 280 U. S. 19. It has few of the indicia of a private litigation and makes no requirement for the presence in it of any private party other than the employer charged with an unfair labor practice. The Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining * * *."

In Amalgamated Workers v. Edison Co., 309 U. S. 261, at p. 265, the court said:

"The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce."

In Board v. Hearst Publications, supra (p. 123) the court said:

"The Wagner Act is federal legislation, administered by a national agency, intended to solve a national problem on a national scale."

In N. L. R. B. v. Colten, 105 Fed. (2d) 179, 182, we said:

"This contention, however, ignores the essential nature of regulatory statutes of the class here considered, and the scope and purpose of administrative orders made in exercise of powers conferred by such legislation. They are to implement a public social or economic policy not primarily concerned with private rights, and through remedies not only unknown to the common law but often in derogation of it."

This statement was in substance repeated in Consumers Power Co. v. N. L. R. B., 113 Fed. (2d) 38, 44 (C. C. A. 6).

In selecting appropriate units for collective bargaining, the duty of the Board to consider the public interest as a material factor is not different from that imposed upon it in the administration of any other feature of the Act. It must consider the public interest and may not delegate its authority in this respect. See Marshall Field & Co., v. N. L. R. B., 135 Fed. (2d) 391, 393 (C. C. A. 7). To assist it in arriving at a conclusion, it may, under Sec. 9 (c) of the Act [29 U. S. C. A., Sec. 159 (c)] take a secret ballot of employees, but it is not compelled to do so. Marlin-Rockwell Corp. v. N. L. R. B., supra (p. 587). In case an election is held, the Board should consider the will of the majority of the employees, but the result of the election does not altogether conclude the matter. In N. L. R. B. v. Delaware-New Jersey F. Co., supra (p. 137), the court said:

"But the point here is, not what the officers want, not what the men want, nor what the company either wants or is willing to acquiesce in, but rather what is the public interest."

This statement had approval in Glen Alden Coal Co. v. N. L. R. B., 141 Fed. (2d) 47, 50 (C. C. A. 3).

We think that in each order under review the Board failed to give adequate consideration to the national welfare and this is a fundamental error. In adopting the conclusions of the trial examiners that the Unions selected by a majority of the plant protection employees were appropriate, the Board failed to give effect to the fact that from December 11, 1941, the country was at war, a fact which we judicially know, and it failed to consider the further unquestioned fact that each respondent was engaged in the production of war material and other necessities for the armed forces and the national war effort.

We proceed to consider the undisputed facts in each case.

In the Jones & Laughlin case, No. 9730, the respondent on June 30, 1942, acquired and began to operate two steel plants in Cleveland, known as the "Otis Works." In that year it produced in these plants one million tons of its products. It employed approximately 4,700 men and women in its mills and buildings; to protect its investments in these plants and to keep peace and preserve order among its employees, it maintained a force of uniformed plant guards, consisting of a captain, eight lieutenants, fifty-eight patrolmen, two fire captains, two firemen and two "dump laborers" who performed plant protection work. It was the duty of the guards to keep out intruders; to see that the rules and regulations of respondent were observed within the plant for the benefit of all concerned, and to act as conservators of the legal rights of respondent. They had the additional responsibility of

carrying out the orders of the management, often of a confidential nature. The duties of the fire captains and firemen are indicated by their titles.

In the Federal Motor Truck Co. case, No. 9769, the respondent in 1942 operated three plants in Detroit in the exclusive production of motor trucks, bodies, cabs, and parts for use in the war effort. In that year it delivered finished products to points outside of Michigan of the approximate value of $25,000,000.00. It had about 660 production employees and about 18 plant protection employees. The duties of these employees were substantially similar to the guards or watchmen in the Jones & Laughlin plants. It was their duty to identify all workmen, trucks, and cars that entered or left the plant; to examine the parcels and lunch boxes of the employees; to escort railroad cars into the yards; to make recommendations as to the discharge of employees and to make arrests, without warrants, for violation of the Sabotage and Espionage Acts.

In common with similar watchmen or guards employed in the Jones & Laughlin plants, they carried arms, wore uniforms, were organized into companies, and were militarized. They were styled Auxiliary Military Police and were commanded, drilled, and instructed as such. They were required to enter into an agreement with the United States that they would well and faithfully discharge their duties in the protection of war materials and utilities, and would obey any orders in connection therewith issued by the President as Commander-in-Chief, or his duly authorized officers, and would be governed by the Articles of War and would subject themselves to military law. They were required to take the usual oath incident to induction into the Army.

Upon the other hand, when they were inducted into the Unions and became subject to their orders, rules, and decisions, the plant protection employees assumed obligations to the Unions and their fellow workers, which might well in given circumstances bring them in conflict with their obligation to their employers, and with their paramount duty as militarized police of the United States Government.

The national welfare is of supreme importance and especially is this true in time of war. The evidence reflects the deep concern of the Government for the maintenance and protection of respondents' plants and for the integrity and volume of their products.

If these matters were given consideration by the Board it was nowhere reflected in any of its orders or decisions. It contented itself with the adoption of the reports of trial examiners that the units selected were appropriate for the purposes of collective bargaining with respect to rates of pay, wages, hours, and other con-

ditions of employment. It nowhere finds that the bargaining units were selected in deference to the imperative public interests. Assuming that the units selected would in their negotiations have due regard for the national welfare, such an assumption would not satisfy the statute.

The Board, under Sec. 9 (b) had a positive duty to perform in the interest of the public. It must be kept in mind that in time of national peril, the preservation, protection, and promotion of the national welfare is the paramount objective; and the Board must select bargaining agents with this in view. It must anticipate that the Union selected as agent would negotiate through individual members who had a common interest with the employees in securing for themselves advantageous agreements with respect to hours, wages, and other conditions of employment. It is manifest that these personal interests of the bargainors, as well as the demands made upon them either by the employees or employers might necessarily constitute a serious and embarrassing handicap when it came to the consideration of the interest of the public. When these particular Unions were selected as bargaining agents for the plant protection employees, these employees might in an effort to discharge their duty to their employer find themselves in conflict with other members of their Union over the enforcement of some rule or regulation they were hired to enforce; or upon the other hand, in conflict with the Federal Government because of fealty to the Union at the time of a dispute involving the public interest. We think that the imposition of such strains upon personal allegiance and personal interest would undoubtedly be detrimental to the public interest and to the free flow of commerce.

Confining ourselves to the facts of these particular cases, we conclude for the reasons indicated, that the applications to enforce the orders under review should be, and they are, therefore denied.

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In the United States Circuit Court of Appeals for the Sixth Circuit

Nos. 9730 and 9769

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JONES & LAUGHLIN STEEL CORPORATION, RESPONDENT

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FEDERAL MOTOR TRUCK COMPANY, RESPONDENT

PETITIONS OF NATIONAL LABOR RELATIONS BOARD FOR REHEARING

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Sixth Circuit:

The National Labor Relations Board respectfully petitions this Honorable Court for a rehearing in the above-entitled causes and respectfully shows to the Court as follows:

On December 8, 1944, the Court issued an opinion in the above-entitled causes in which it denied enforcement to orders of the Board requiring respondents to bargain with labor organizations representing separately constituted bargaining units of plant protection employees at each of respondents' plants. In our view, these decisions are of great importance be-

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cause they so alter basic labor relationships in wartime as to threaten the public interest. In its briefs in both cases the Board was concerned with respondents' contentions that plant protection employees are not employees within the meaning of the Act, since these were the contentions primarily pressed upon the Board, rather than with the impact of the militarized status of the plant protection employees upon the bargaining unit or the type of bargaining agency which the employees may select. Because the Court denied enforcement to the Board's orders for the latter reasons only, we present here considerations which we believe were either inadequately or not at all presented to the Court concerning the relationship between the militarized status of the guards, the bargaining unit and the type of bargaining agency selected, and the national welfare.

I

The Court's decisions holding that the public interest requires denial of the Board's bargaining orders are inconsistent with authoritative military regulations which endorse the bargaining procedures involved not only in this case but in some 175 others. Thus, on March 17, 1943, the War Department issued from the Headquarters of the Army Service Forces its Circular No. 15 in which the military authorities charged with the security of industrial plants throughout the nation laid down regulations governing the status of plant protection employees enrolled in the auxiliary military police of the type involved here.[1]

[1] These regulations appear in the record of No. 9769 at pp. 75–96.

Under the heading "Labor Relationships," these regulations spell out the type of collective bargaining relationship deemed consistent with security. Section 6 h (2) of the regulations provides (No. 9769, R. 86):

> Auxiliary Military Police are permitted to bargain collectively, but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police. In view of recent decisions by the National Labor Relations Board (see *In re Lord Mfg. Co.* v. *United Rubber Workers of America, CIO,* Case No. R–4820, February 1943), the Auxiliary Military Police should be represented in collective bargaining with the management by a bargaining unit other than that composed of the production and maintenance workers, although both bargaining units may be affiliated with the same labor organization. Where the guards are not now included in the same bargaining unit, this is mandatory; where the guards are included in such unit, serious consideration will be given to effect a change to conform to the foregoing policies.

It is evident from the foregoing that the military authorities view the collective-bargaining relationship as one appropriate to the status of plant-protection employees and consistent with their security functions. Likewise, the interests of security do not require, in the view of the military authorities, that the bargaining agent be a different one from that representing the production and maintenance workers. Considerations of security do, however, require that the bargaining unit into which plant-protection em-

ployees are grouped be confined to such employees and that such unit be separate from bargaining units of production and maintenance employees. In adopting this precaution, the Army Service Forces expressly followed[3] the Board's decision in *Matter of Lord Manufacturing Company* (54 N. L. R. B. 1032, decided February 25, 1943). This case is one of a series of cases in which the Board itself, even before the issuance of the regulation above adverted to, abandoned its normal determinants for the shaping of units of guards and production workers, such as the functional coherence between the two kinds of work, the history of bargaining, whether on a differentiated or joint basis, and the desires of the organizations involved.[3] Instead, the Board, in explicit deference to the wartime status of plant-protection employees, laid down a fixed administrative policy of confining plant-protection employees in plants engaged in war work to a bargaining unit separate from a unit of production workers.[4] It was this administrative pol-

[3] See No. 9769, R. 86–87.

[3] See *Third Annual Report* of the National Labor Relations Board (Government Printing Office, 1938), pp. 184–190.

[4] The manner in which recognition of wartime conditions molded prior discretionary consideration in this area into a settled administrative policy is seen from two cases, *Matter of U. S. Electric Motors, Inc.*, 45 N. L. R. B. 298 (October 31, 1942), and *Matter of Julius Petersen*, 46 N. L. R. B. 1049 (January 13, 1943), both of which are cited in the *Lord* decision. In the former case, the only labor organization involved in the proceeding sought to include the plant guards within a unit of production and maintenance employees. The Board noted (45 N. L. R. B. at 300) that the "guards have recently been inducted as civilian members of the Auxiliary Military Police with a dual responsibility to the com-

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icy, initiated by the Board in order to accommodate collective bargaining to the exigencies of war production, which the military authorities adopted. It is to be further noted that although in the *Lord* case the organization which sought to represent the guards was different from that representing the production workers, the military authorities declined to impose such organizational differentiation as a security requirement in collective bargaining but, on the contrary, expressly permitted "the same labor organization" to represent both bargaining units.

Because the term, "the same labor organization," as used in Circular No. 15, involved an ambiguity, a clarifying memorandum was issued by the War Depart-

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pany and to the military authorities for the greater safety of the plant." The Board then pointed out, "At the request of the only labor organization involved in a representation proceeding, the Board has frequently included ordinary watchmen in a single industrial unit with production and maintenance workers. Under present conditions at the plant, and in the absence of any precedent of past bargaining between the Company and its employees including watchmen, we shall exclude guards from the unit composed of regular production and maintenance employees." In the *Petersen* case a C. I. O. union sought the inclusion within a unit of production employees of armed guards subject to the regulation of the United States Coast Guard, while an A. F. of L. organization proposed that they be excluded. After noting their security functions, the Board stated (46 N. L. R. B. at 1054): "For reasons we have set forth in other decisions, we have held that such plant protection employees are advisedly excluded from units of production employees and are properly included in a bargaining unit restricted to employees of their class. We shall therefore exclude plant-protection employees from the unit for general production and maintenance employees and shall include them, excepting their captain, in a separate unit for bargaining purposes."

ment on July 10, 1943, for the commanding generals of all service commands. This memorandum[5] states:

> 1. It has been reported to the headquarters that labor officers are interpreting Circular No. 15, this headquarters, 17 March 1943, subject, "Auxiliary Military Police," as prohibiting membership of plant guards enrolled as Auxiliary Military Police in the same trade union local as that representing production and maintenance workers.
>
> 2. Paragraph 6 (*h*) (2), Circular No. 15, presents applicable War Department policy on plant guard labor representation.
>
> 3. In the event that plant guards enrolled as Auxiliary Military Police desire to be represented in collective bargaining with the management, they should be represented by a bargaining unit other than that representing the production and maintenance workers. However, in such event, ***both bargaining units may be affiliated with the same trade union local,*** provided they are, in fact, separate bargaining units. [Italics supplied.]

This document makes it apparent that, once plant protection employees are segregated in a separate bargaining unit, the requirements of security are fully met and not only may the same international union represent them which represents the production workers but they are free to select the same local union which represents the production workers.

The instant cases therefore fall well within the Army's security requirements. In the *Federal Motor*

[5] Printed in full as Appendix A.

case not only did the Board prescribe a separate bargaining unit but the union involved was a local limited only to plant protection employees (R. 22–23). In the *Jones & Laughlin* case the unit also excluded production workers and the International Union, which sought to represent them, undertook, as the Board found, to bargain for the plant protection employees separately (R. 74). (And we are informed by our Regional Office that the International Union, involved in the *Jones & Laughlin* case, chartered a separate local for plant protection employees.)

It would thus appear that the Court's decisions, if left standing, would condemn the Board as arbitrary in cases in which the unit is shaped not only in accordance with the views of the security authorities but in which additional safeguards assure effective accommodation of the collective bargaining rights of plant protection employees to their wartime responsibilities. In so deciding the Court has, inadvertently we believe, not only substituted its judgment for that of the Board and the military authorities but has also exposed wartime commerce to the very perils of interruption which Congress in the National Labor Relations Act has sought to prevent by promoting freedom of choice.

II

Congress has imposed upon the Board the duty so to fashion bargaining units as "to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act." Section 9 (b). But the

Board does not hew to the statutory objective single-mindedly and without regard to other aspects of Federal policy. In the present case the Board has carefully framed an area of accommodation between the objectives of the statute and the requirements of war production. We submit that the Court has not only overlooked this fact but, in insisting that the key statutory value of free choice itself be abandoned in the public interest, has also ignored the effects upon wartime production of a denial of free choice.

"The policies of this Act" apply with a peculiar urgency to a nation at war. The need for uninterrupted war production may not be viewed as a secondary consideration to be lightly jeopardized by the creation of barriers to that freedom of choice which Congress has deemed essential to an undisturbed commerce. The fact that militarization has imposed greater restrictions upon the plant-protection employees has not been deemed by the military authorities themselves a reason for denying them the benefits of the Act.* Indeed, the surrender by plant-protection employees of traditional rights and their submission to novel restraints emphasize rather than relax the need for maintaining the integrity of the right of choosing a bargaining representative, for the bargaining process is then the only way in which

*The Board has been informed by representatives of the Army Service Forces that in accordance with the Army's policies of restoring civilian controls to industry wherever possible, the militarization program has been contracted from 15,000 to 3,000 plants and that the number of guards militarized has fallen from 190,000 to between 50 and 60 thousand. Pursuant to this policy,

problems arising out of the relationship may be defined and solved.[7]

The Court's decisions hold that plant protection employees are not to have "unions of their own choosing." Its holding that broader considerations of national safety require such an extraordinary result cannot be reconciled with authoritative Army regulations which plainly reflect an unwillingness, because of any fears of a division in allegiance, to break down the exercise by plant protection employees of their rights under the statute and to expose war plants to consequent labor unrest.

Insofar as the decisions reflect the view that membership in the unions here involved will jeopardize the loyalty of the guards to their employer, it should be pointed out that as long ago as 1937, the Supreme Court[8] rejected an analogous contention by pointing out, as the Board did in these cases, that the Act in no way limits the power of discharge for improper performance of duty. In addition, bargaining contracts for plant guards impose upon them special responsibilities and take cognizance of their peculiar

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the Jones & Laughlin plant involved in this proceeding has already been demilitarized and the Federal Motor establishments here involved have been, or are in the process of being demilitarized.

[7] See *Matter of Budd Wheel Co.*, 52 N. L. R. B. 660, 670, and compare *In re Youngstown Sheet & Tube Co.*, decision of Regional Board VI of the War Labor Board, Case No. 111–3602–D, decided April 7, 1944, 15 War Labor Rep. 500, in which the latter Board awarded a union of production workers representing plant guards a maintenance of membership contract and rejected a contention similar to that which forms tht basis of the Court's decision.

[8] In *Associated Press* v. *N. L. R. B.*, 301 U. S. 103, 131–132.

status. An examination of more than fifty contracts[9] between production workers' unions and employers engaged in war production covering militarized guards and related workers discloses that the unions involved are fully aware of the responsibilities of armed guards.

Thus, a standard provision in such contracts states that nothing therein should be construed to abrogate or interfere with the War Department's control over such employees or their duties and responsibilities as auxiliary military policemen.[10] Production unions likewise agree that the guards perform their assigned duties "impartially and without regard to any union or nonunion affiliation or activities." The unions involved further agree to respect the confidential character of information which guards may acquire, to refrain from strikes, stoppages, or interruptions of work. Of particular significance here is a frequent undertaking by production unions representing plant protection employees that in the event of a strike of production workers, the guards will continue to report for duty, remain at their posts and discharge their assigned duties in the usual manner.

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[9] These documents are on file in the Industrial Relations Division, Bureau of Labor Statistics, Department of Labor. Relevant and typical selections from them are set out in Appendix B.

[10] Such a provision is printed in full in Appendix B. See also *In re Brewster Aeronautical Corp.*, decision of National War Labor Board, Case No. 111–3372–D, decided September 24, 1943, 11 War Labor Rep. 286, and *In re Great American Industries*, decision of Regional Board IV of the War Labor Board, Case No. 111–467–C, decided August 27, 1943, 11 War Labor Rep. 287.

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Finally, characteristic of these contracts are provisions that failure on the part of any plant protection employee "to observe and fulfill work responsibilities shall be just cause for discipline by the company up to and including summary dismissal."

The Army regulations and scores of Board decisions in this field [11] have given rise to a bargaining structure which the Court's decisions destroy. If the decisions remain standing, this delicate and difficult area of labor relations will be subject to the explosive consequences which a denial of free choice necessarily entails. Moreover, existing bargaining contracts, grievance procedures, and other mechanisms of adjustment are swept away. An invitation is extended for the launching of new unions and of new organizing drives in war plants. A justification is supplied for the invasion of plants already organized by one union of production workers by another production workers' union for the purpose of organizing plant guards. Such a situation in a plant means not only poor labor relations but makes possible serious interunion rivalries. Problems of union recognition, highly productive of industrial disputes,[12] will be precipitated in the nation's war plants. And in limiting the statutory rights of plant guards, the decision can only serve to intensify manpower problems and

[11] In the past two years and last 15 volumes of its decisions, the Board has decided no less than 175 cases in which it has approved a bargaining pattern of the type here involved. These cases are collected in Appendix C.

[12] U. S. Dept. of Labor, Bulletin No. 782, *Strikes in 1943* (Washington, D. C., 1944), p. 18.

to demoralize both guards and production workers by insisting that, as a matter of law, their self-interest is greater than their patriotism.

Finally, the decision undermines the entire stabilization program for plant guards. Scores of contracts already approved by the War Labor Board in which production workers' unions represented plant guards are now condemned.[13] Solution of pressing wage and union security problems in cases now pending before the War Labor Board must be deferred until the underlying bargaining procedures conform to the Court's decision.[14]

War production must be protected from these consequences; the public interest in an undisturbed commerce, which the statute safeguards, is consistent with the national welfare which is the Court's concern.[15]

III

The Court's decisions may not be justified by any asserted defect in the Board's findings or any failure

[13] That this is no mere speculation, see the *Youngstown Sheet & Tube* case, *supra*.

[14] Both in regional proceedings of the War Labor Board in Detroit and in national Board proceedings in Washington, employers have sought on the basis of the Court's decision to suspend processing by the War Labor Board of cases involving plant guards.

[15] The cases cited by the Court which stress the "public" aspect of the statute in no sense minimize the importance of freedom of choice. They contrast private rights not with an undifferentiated and undefined public welfare but with the public interest in a free flow of commerce which forms the basis of the statute. And far from holding that extrastatutory considerations limit the powers of the Board, as the Court suggests, these cases expand the powers of the Board precisely because of the public importance of the statutory objectives.

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by the Board properly to balance the statutory rights of the plant guards against the special responsibilities which wartime conditions impose upon them. In both of these cases the Board found that the unit which it selected is "appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act" (No. 9769, R. 26; No. 9730, R. 74). In both of these cases the Board found that respondents' refusals to bargain with the respective unions "tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce" (No. 9769, R. 110; No. 9730, R. 88). We submit that these findings give effect "to the imperative public interests" which the Court claims the Board has slighted in a concrete and important way. How could uninterrupted war production be assured if other interests required the Board to disregard conduct which, as declared by the statute, burdens and obstructs commerce in the goods produced?

At the other end of the scale, the Board gave full recognition to the special wartime role of plant guards. Thus, as we have already noted, it deviated from its administrative norms and put into effect its wartime policy of placing such guards in separate units. In both cases, moreover, the Board noted the special character of plant guard functions and the relationship of the plant guards to the United States Government (No. 9730, R. 73; No. 9769, R. 25). In both cases the Board adverted to its prior administrative decisions rejecting the reasons for denying controlling effect to the considerations deemed determinative by the Court (No. 9730, R. 73–74, 99; No. 9769, R. 26).

The decisions cited by the Board establish that the Board's instant determinations are not casual and unconsidered, as the Court suggests, but a specific application of a developed administrative policy in which contentions with respect to the wartime status of guards have been weighed against the statutory objectives. Thus, in *Matter of Chrysler Corp.*, 44 N. L. R. B. 881, 885–886,[16] the Board placed plant guards in a separate bargaining unit and noted that "The present production of war materials at the Company's plants increases the importance of their work and their responsibilities." The Board then rejected the argument which forms the basis of the Court's decisions in the following language:

> The Company further contends that the Board should dismiss this proceeding on the ground that the organization of plant-protection employees and their affiliation with the same labor organization which represents the Company's production and maintenance employees, whose activities they watch and guard, has materially lessened the efficiency of the former. We perceive no necessary conflict between self-organization for collective bargaining and the faithful performance of duty. Freedom to choose a bargaining agent includes the right to select a representative which has been chosen to represent other employees of the employer in a different bargaining unit. We are mindful of the increased responsibilities placed upon plant-protection employees in wartime, but the practices and procedures of collective

[16] Cited by the Board in No. 9730, R. 74; see also No. 9769, R. 26.

bargaining are flexible and may make full allowance for such added responsibilities.[7] If, in the instant case, the plant-protection employees select a local affiliated with the International to represent them as bargaining agent, it will be incumbent upon the International to impose a proportionate responsibility upon both organized groups of employees in order that their respective duties may be adequately and impartially performed. In any event, the remedy for inefficiency or wilful disregard or neglect of duty on the part of the plant-protection employees lies implicitly in the power of the Company to discipline or discharge them and in the power of the military authority to take all necessary steps to protect the public interest. We find, therefore, no reason to deny the request of the Company's plant-protection employees to constitute a separate bargaining unit and to deny them, as such, the right to bargain collectively with their employer through a representative of their own choosing.

[7] See also *Matter of Frigidaire Division, General Motors Corporation*, and *United Electrical, Radio & Machine Workers of America (C. I. O.)*, 39 N. L. R. B. 1108, and cases cited therein. [Board footnote.]

The care with which the Board has treated this problem and its consciousness of the considerations involved is also manifest from its decision in *Matter of Dravo Corp.*, 52 N. L. R. B. 322, 327–328.[17] In the *Dravo* case the Board not only segregated the guards from production workers for bargaining purposes but separated a unit of guards who were militarized

[17] Referred to by the Board in No. 9730, R. 99.

from those who were nonmilitarized. It thus indicated the reasons for its decision:

> The second argument raised by the Company deals with a possible conflict of interest which may arise when plant-protection employees join a labor organization. We give no weight to the implication that membership in a union tends to undermine the honesty of plant-protection employees or their competence to execute their duties satisfactorily. Self-organization for collective bargaining is not incompatible with efficient and faithful discharge of duty. Should the performance of an employee deteriorate, the Company always has recourse to its normal disciplinary authority to insure the maintenance of its standards of work.
>
> We come now to the question whether the militarization of guards alters the character of their employment. It cannot seriously be contended at this time that guards who are sworn into temporary membership in the armed services lose thereby any of the benefits of the Act.* On this issue, the petitioner and the Company are far apart in their contentions, the Union arguing that the fact the guards are sworn into reserve membership in the armed services is no reason for segregating them from other employees, whereas the Company urges that this should prevent these employees from being represented by any union which represents any other category of personnel employed by the corporation. In our view, neither conten-

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*See *Matter of Consolidated Steel Corporation, Ltd.*, 51 N. L. R. B. 333, and cases cited therein. [Board footnote.]

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tion can be supported. We cannot regard the induction of the guards into the Coast Guard Reserve as a meaningless act, since it does indicate that such persons from the nature of their oaths then owe allegiance directly to the Government, as well as to the corporation. The services do not contend, however, that such persons thereby become Government employees and are therefore outside the provisions of the Act. Nor would the facts in this case support such a contention, for it is clear that the wages and duties of this group of personnel remained unchanged after their induction so that it is apparent that the proximate relationship of employer and employee still exists between the Company and the guards.

We therefore feel constrained to hold that the guards, as well as other employees, are free to select their own bargaining representatives under the Act.

The militarization of plant-protection employees, while no obstacle to unionization, is nevertheless significant. As civilian auxiliaries of a military force, the guards have greater duties and obligations than have those plant-protection employees who are not militarized. To the end that the guards may be better able to function within the military sphere, and to permit the military authorities to exercise greater control over the guards, we shall establish a bargaining unit for all militarized plant-protection employees separate and apart from those who are nonmilitarized. We contemplate that the separation of the bargaining units in their negotiations with the Company and their day-to-day activities will be one of fact, not

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merely form. Since the petition for the nonmilitarized plant-protection employees does not raise the problem of merging them with the main unit of production and maintenance employees, we find it unnecessary to decide that question here.

Finally, in *Matter of Budd Wheel Co.*, 52 N. L. R. B. 666, 669–672,[18] the Board again enunciated administrative policy with respect to plant guards. It pointed out that in prior cases it had "consistently placed plant guards in units separate and apart from any unit of production and maintenance employees." In rejecting a contention that it would not effectuate the policies of the Act to order the Company to bargain with a union representing the guards, the Board stated:

> The declared policy of the Act is "to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred." Among the obstructions set forth in the Act are "strikes and other forms of industrial strife or unrest" and "inequality of bargaining power." It can hardly be seriously contended that such obstructions result only from conflict between production employees and the employer. Nor do we believe that the war has eliminated all these obstructions; on the contrary, strife and unrest and inequality of bargaining power are likely to continue in the absence of collective bargaining, particularly in the face of self-imposed limitations on the right to strike and, in the case of

[18] Cited in No. 9730, R. 99.

militarized guards, the necessary restrictions imposed by the Government.

The Board's determinations in the instant cases are an expression of a policy which has been applied in the foregoing and in scores of other cases.[19] They cannot be viewed, as the Court appears to, as an administrative lapse occasioned by an unconsidered and routine treatment of a new problem. They may not be wrested out of their context nor may the Board be placed in default because it did not repeat every argument which its administrative policy rejects or every consideration upon which it is based. Cf. *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80; *N. L. R. B.* v. *Regal Knitwear Co.*, 140 F. (2d) 746 (C. C. A. 2), certiorari granted on another point, 65 Sup. Ct. 35.

The Board has tested this administrative principle against the record facts in case after case. But the Court has discarded it not on the basis of any fact but solely because of its belief that it would "undoubtedly" injure the public interest. We cannot believe that administrative policy, so evolved, should be brushed aside by a court without a more substantial showing of impropriety, particularly where to do so involves a sacrifice of the statutory principle of free choice and a concomitant threat to war production.

Wherefore, it is prayed that a rehearing of these cases be granted, because of the great importance of

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[19] See, National Labor Relations Board, *Seventh Annual Report* (Gov't Print. Off., 1943), p. 63; *Eighth Annual Report* (Gov't Print. Off., 1944), p. 57.

the issue involved, and that on such rehearing the orders of the Board be enforced.

Respectfully submitted.

ALVIN J. ROCKWELL,
General Counsel,
MALCOLM F. HALLIDAY,
Associate General Counsel,
FRANK DONNER,
Attorney,
National Labor Relations Board.

JANUARY 1945.

CERTIFICATE OF COUNSEL

Comes now Alvin J. Rockwell, General Counsel for the National Labor Relations Board, and certifies that he has read and knows the contents of the foregoing petition, and that said petition is filed in good faith, and not for purposes of delay.

ALVIN J. ROCKWELL.

WASHINGTON, D. C., *January 1945.*

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APPENDIX A

WAR DEPARTMENT,
HEADQUARTERS, ARMY SERVICE FORCES,
WASHINGTON 25, D. C., 10 July 1943.

MEMORANDUM FOR COMMANDING GENERALS, ALL SERVICE COMMANDS

Subject: Plant guards.

1. It has been reported to this headquarters that labor officers are interpreting Circular No. 15, this headquarters, 17 March 1943, subject, Auxiliary Military Police, as prohibiting membership of plant guards enrolled as Auxiliary Military Police in the same trade-union local as that representing production and maintenance workers.

2. Paragraph 6 (*h*) (2), Circular No. 15, presents applicable War Department policy on plant guard labor representation.

3. In the event that plant guards enrolled as Auxiliary Military Police desire to be represented in collective bargaining with the management, they should be represented by a bargaining unit other than that representing the production and maintenance workers. However, in such event, both bargaining units may be affiliated with the same trade-union local, provided they are, in fact, separate bargaining units.

SPX 231.4 (6 Jul 43) SPGCL-MB-E-M.

BY COMMAND OF LIEUTENANT GENERAL SOMERVELL:

J. A. ULIO,
Major General,
Adjutant General.

I hereby certify this to be a true copy of the original.

(s) SIDNEY C. SUFRIN,
Sidney C. Sufrin,
Lt. Col., CMP.

APPENDIX B

Selections From Current Contracts Between Producers of War Materials and Production Unions Representing Militarized Guards Illustrating Clauses Insuring the Proper Performance of the Protection Function

Curtiss-Wright Corporation, Airplane Division—Buffalo Plants, Cheektowaga and Tonawanda, New York, and *Victory Lodge 1661, District 76, of the International Association of Machinists (A. F. of L.)*

Article V

PRIME MILITARY RESPONSIBILITY

It is understood that for the duration of the war this Agreement is, in all respects, subject to the provisions of the directives of the War Department concerning Military Organization of Plant Guard Forces (W. D. Directive, July 2, 1942, AG 231.43; SOS Circular 52, August 28, 1942; and amendments thereto), and nothing in this Agreement shall be construed in any way to interfere with the organization, training, and control by the War Department of the Employer's guard force as an Auxiliary to the Military Police, nor shall it operate to abrogate or interfere with the duties, responsibilities, and rights imposed by the War Department upon any employe in such Auxiliary Military Police.

(The above clause is contained in all contracts covering military guards on file with the Department of Labor.)

Article VII

STRIKES AND LOCK-OUTS

It is agreed that it is the purpose and intent of the parties hereto that all grievances or disputes arising between them over the interpretation or application of any of the terms of this Agreement shall be settled by the procedure set forth in Article XXI hereof.

The Union agrees that during the term of this Agreement there shall be no strikes, slow-ups, slowdowns, sit-downs, sympathy strikes, picketing, stoppages of work, or any other form of interference with production or other operations. The guards shall continue to discharge their duties even though other employes of the Employer may be on strike or picketing. The Employer reserves the right to cancel this Agreement in the event of any violation of this article or Article XI, and in addition, any individual or group violating the above may be discharged. The Employer agrees there shall be no lock-outs.

Bell Aircraft Corporation, Georgia Division, Marietta, Ga., and *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local 513 (C. I. O.)*

Article V

RULES FOR GUARDS

1. The Union and its members recognize that it is the responsibility of the Guards to familiarize themselves with the established plant rules and to faithfully report all violations of these rules.

2. The Union and its members agree that the guards shall discharge their assigned duties impartially and without regard to any Union or Non-Union affiliation or activities of any Company employee or employees, and that failure to do so will constitute cause for disciplinary action.

3. The Union and its members agree that every Guard shall keep confidential and not divulge to any person other than the Management of the Company (or the United States Army if so required during the war emergency) all confidential information involving plant security obtained from any source which has any bearing upon the Company and its plants, its operations, or personnel.

4. The Union and its members agree at no time to engage in any strike, work stoppage, sit-down or picketing, or any other activity which may interrupt their protection of the Company's premises or employees.

5. The Union agrees that, in the event of any strike, work stoppage, slow-down, picketing, or any other interruption of or interference with production of the Company at any of its plants caused by or engaged in by other employees of the Company, the employees who are members of the Union will continue to report for duty, remain at their posts, and, in the regular manner, discharge their duties assigned to them.

6. The Union agrees that failure on the part of any employee or employees to observe and fulfill such responsibilities shall be just cause for discipline by the Company up to and including summary dismissal.

* * * * * * *

Curtiss-Wright Corporation, Airplane Division, Columbus Plants, Columbus, Ohio, and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Curtiss-Wright Local 927

ARTICLE VII

STRIKES AND LOCK-OUTS

* * * * * * *

The Union agrees that during the term of this Agreement there shall be no strikes, slow-downs, sit-downs, sympathy strikes, picketing, stoppage of work, or any other form of interference with duties even though other employees may be on strike or picketing. Any individual, or group, violating the above will be disciplined by the Union and are subject to discharge by the Employer. The Employer agrees there shall be no lock-outs.

ARTICLE VIII

COOPERATION

The Union and its members recognize that it is the responsibility of the Plant Protection employees to familiarize themselves with the plant rules established by the Employer and to faithfully report all violations thereof. The Union and its members further agree that the Plant Protection employees shall discharge their assigned duties impartially and without regard to any Union or nonunion affiliation or activities of any employee or employees, and that failure to do so will constitute cause for disciplinary action.

Aluminum Company of America, Detroit, Michigan, and *International Union UAW—Amalgamated Plant Protection Local Union No. 114 (CIO)*

9. Plant Protection and Military Organization of Plant Guard Forces

It is realized by the parties hereto that the adequate and continuous protection of the Company's Plant, Premises and Products is of paramount importance, and each party agrees that there shall be no interference whatsoever in the maintenance of satisfactory Plant Protection so long as required by the Company, and Plant Protection Employees covered by this agreement shall continue to perform their duties irrespective of a strike of other unions or employees at the Company's Plant.

Where necessary to instruct Plant Protection Employees as to their duties in connection with suspected plant sabotage or thievery, and such instructions are deemed confidential by the Company or any Public Officer, such instructions and information shall not be disclosed by them to the Union, Union officers, or others. Any such necessary instructions shall be given directly to each individual guard by a direct representative of the Management. Any Plant Protection Employee violating this rule will be subject to discipline, up to and including dismissal.

For the duration of the war, should any difference arise between the Company and the Union as to the meaning or application of the provisions of this Agreement as to hours of work, rates of pay, or conditions of employment, or should any trouble or controversy of any kind arise in, or with respect to, the plant as between the Company and the Union, there

shall not, on account or by reason of such difference, controversy, or trouble, be any strike, suspension, or slow-up of work at the plant, either prior to or during efforts to settle such difference, controversy, or trouble, or after the settlement thereof, but all such differences, controversies, or troubles shall be settled with the utmost dispatch, and only in the manner set forth under Grievance Procedure.[1]

Columbia Steel Company, Torrance Works, California and *United Steel Workers of America*

SECTION 2. Recognition.

* * * * * * *

The Union recognizes that it is the responsibility of the Plant Protection employees to familiarize themselves with the shop rules established by the Company and to faithfully report all violations thereof. The Union agrees that the Plant Protection employees shall discharge their duties, as assigned to them, impartially and without regard to any union or nonunion affiliation of any employee of the Company, and that failure to do so constitutes sufficient cause for discipline up to and including dismissal, and for reporting such cases to the proper representatives of the War Department.

The Union recognizes that it is the responsibility of the Plant Protection employees to guard and protect the employees and their property while on plant property; the plants, premises, material, facilities, and property of the Company at all times and to enforce the Company's rules under all circumstances. The Union agrees that its members shall faithfully dis-

[1] The above selection from a contract claims particular attention since it was executed by the local union involved in the *Federal Motor* case.

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charge this responsibility, and during the life of this Agreement that it will not cause or permit its members to cause nor will any member of the Union take part in any strike, sit-down, stay-in, stoppage of work, or other interference with or refusal to perform their duty regularly assigned to them. The Union further agrees, in the event of any controversy between the Company and any other group or organization of its employees, resulting or threatening to result in any strike, stoppage of work, or other interference with production, that its members will continue to report for duty, remain at their posts, and in the regular manner, discharge the duties assigned to them. The Company reserves the right to discipline, including discharge, in accordance with Section 9, any employees who violate any provision of this Section.

American Smelting & Refining Company—Federated Metals Division—Newark Plant and *International Union of Mine, Mill and Smelter Workers (CIO)*

ARTICLE III

POLICY OF THIS AGREEMENT

* * * * * * *

SECTION 3. The Union recognizes and agrees that the Employees covered by this agreement have a *special, confidential,* and *direct responsibility* to the Company requiring—

(a) That such Employees completely and diligently devote themselves to the interest of the Company.

(b) That such Employees familiarize themselves with and comply with all police, property-protection, and safety rules, regulations, and orders relating to the Plant and all directions and instructions of the Management of the Company relating to the Plant.

(c) That such Employees enforce said rules, regulations, orders, directions, and instructions and faithfully report to the Management of the Company all infringements or violations thereof and all other information as to activities detrimental to the Company, its plants, or its employees.

(d) That such Employees keep confidential and do not divulge to any person other than the Management of the Company all information obtained from any source having any bearing upon the Plant, its operations, or personnel.

(e) That such Employees fulfill and discharge their duties diligently, conscientiously, and impartially and without any regard to any Union or nonunion affiliation of any employee or employees of the Company or any other person or persons, and shall not engage in union activity on Company time.

(f) That such Employees conduct themselves at all times, both on and off duty, in accordance with the confidence and trust reposed in them.

(g) That such Employees at no time engage in any strike, mass-quit, work-stoppage, slow-down, sit-down, picketing, or any other conduct which may, in any way, interrupt or interfere with production at the Plant and that they will at all times fulfill and discharge their duties without regard to any strike, mass-quit, work-stoppage, slow-down, sit-down, picketing, or any other interruption of or interference with production at the Plant.

The Union agrees that failure on the part of any employee or employees to observe and fulfill such responsibilities shall be just cause for discipline by the Company up to and including summary dismissal, except that such action by the Company may be subject to consideration by the Grievance Committee.

SECTION 4. The Union agrees that it will not cause or permit its members to cause, nor will any member of the Union take part in, any strike, mass-quit, work stoppage, slow-down, sit-down, picketing, or any other interruption of, or interference with, production of the Plant, or otherwise violate the foregoing Section 2 hereof, and the Union further agrees that in the event of any strike, mass-quit, work stoppage, slow-down, sit-down, picketing, or any other interruption or interference with production of the Plant caused or engaged in by other employees of the Company, the Employees who are members of the Union will continue to report for duty, remain at their posts, and, in the regular manner, discharge the duties assigned to them. During the term of this Agreement, the Company shall not engage in any lock-out of Employees.

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APPENDIX C

BOARD CASES INVOLVING PLANT PROTECTION EMPLOYEES WHICH APPROVE THE BARGAINING PATTERN INVOLVED HEREIN

Matter of American Forge Company	44 N. L. R. B. 826.
Matter of Chrysler Corporation	44 N. L. R. B. 881.
Matter of General Motors Corp	44 N. L. R. B. 1061.
Matter of The Maytag Company	44 N. L. R. B. 1265.
Matter of McCormick Works	44 N. L. R. B. 1332.
Matter of Campbell Soup Company	45 N. L. R. B. 6.
Matter of Johns-Manville Products Company	45 N. L. R. B. 33.
Matter of The Sherwin-Williams Defense Corporation	45 N. L. R. B. 46.
Matter of Westinghouse Electric & Mfg. Co	45 N. L. R. B. 51.
Matter of Bethlehem Steel Company	45 N. L. R. B. 92.
Matter of Royal Typewriter Company, Inc	45 N. L. R. B. 291.
Matter of The United States Cartridge Company	45 N. L. R. B. 350.
Matter of Otis Elevator Company	45 N. L. R. B. 419.
Matter of Curtiss-Wright Corporation	45 N. L. R. B. 502.
Matter of Westinghouse Electric & Mfg. Co	45 N. L. R. B. 776.
Matter of Curtiss-Wright Corporation	45 N. L. R. B. 1268.
Matter of Todd-Bath Iron Shipbuilding Corp	45 N. L. R. B. 1367.
Matter of Fruehauf Trailer Company	46 N. L. R. B. 390.
Matter of Chrysler Corporation	46 N. L. R. B. 411.
Matter of Bethlehem Steel Company	46 N. L. R. B. 794.
Matter of Combustion Engineering Company, Inc	46 N. L. R. B. 937.
Matter of Western Cartridge Company	46 N. L. R. B. 948.
Matter of Julius Petersen	46 N. L. R. B. 1049.
Matter of Puget Sound Bridge and Dredging Company	46 N. L. R. B. 1071.
Matter of Cramp Shipbuilding Company	46 N. L. R. B. 1186.
Matter of Chrysler Corporation, Evansville Ordnance Plant	47 N. L. R. B. 260.
Matter of Youngstown Sheet and Tube Company (Indiana Harbor Plant)	47 N. L. R. B. 391.
Matter of Westclox Division, General Time Instruments Corp	47 N. L. R. B. 418.
Matter of Pressed Steel Car Company, Inc	47 N. L. R. B. 425.
Matter of Walworth Company, Inc	47 N. L. R. B. 512.
Matter of W. Sherman Burns	47 N. L. R. B. 610.
Matter of Republic Aircraft Products Division	47 N. L. R. B. 892.
Matter of Packard Motor Car Company	47 N. L. R. B. 982.
Matter of Ford Motor Company	47 N. L. R. B. 989.

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Matter of Ford Motor Company, Highland Park Plant ..... 47 N. L. R. B. 946.
Matter of Lord Mfg. Company ..... 47 N. L. R. B. 1082.
Matter of Rockbestos Products Corporation ..... 47 N. L. R. B. 1312.
Matter of Bethlehem Steel Corporation and Bethlehem Steel Company ..... 47 N. L. R. B. 1380.
Matter of J. A. Zurn Manufacturing Co., West 16th St. Div. ..... 48 N. L. R. B. 100.
Matter of The New Britain Machine Company ..... 48 N. L. R. B. 268.
Matter of International Harvester Company ..... 48 N. L. R. B. 273.
Matter of Hurley Machine Division of Electric Household Utilities Corporation ..... 48 N. L. R. B. 295.
Matter of Metalloy Corporation ..... 48 N. L. R. B. 406.
Matter of Ford Motor Company, Willow Run Bomber Plant ..... 48 N. L. R. B. 413.
Matter of Chrysler Corporation ..... 48 N. L. R. B. 512.
Matter of Timm Aircraft Corporation ..... 48 N. L. R. B. 522.
Matter of California Packing Corporation ..... 48 N. L. R. B. 698.
Matter of General Electric Company ..... 48 N. L. R. B. 1395.
Matter of Donner-Hanna Coke Corporation ..... 49 N. L. R. B. 1.
Matter of Briggs Manufacturing Co ..... 49 N. L. R. B. 57.
Matter of Textileather Corporation ..... 49 N. L. R. B. 190.
Matter of The William J. Burns International Detective Agency ..... 49 N. L. R. B. 385.
Matter of Ford Motor Company ..... 49 N. L. R. B. 492.
Matter of Chrysler Corporation ..... 49 N. L. R. B. 704.
Matter of Miami Shipbuilding Corporation ..... 49 N. L. R. B. 803.
Matter of Briggs Indiana Corporation ..... 49 N. L. R. B. 920.
Matter of The Murray Corporation of America ..... 49 N. L. R. B. 925.
Matter of Durez Plastics & Chemicals, Inc. ..... 49 N. L. R. B. 1061.
Matter of Warner Gear Division ..... 49 N. L. R. B. 1122.
Matter of E. I. Du Pont de Nemours and Company ..... 49 N. L. R. B. 1125.
Matter of General Cable Corporation ..... 49 N. L. R. B. 1212.
Matter of Graver Tank and Mfg. Corp. ..... 49 N. L. R. B. 1217.
Matter of Rockland Light & Power Company ..... 49 N. L. R. B. 1308.
Matter of Lennox Furnace Company ..... 50 N. L. R. B. 80.
Matter of Intercontinental Aircraft Corporation ..... 50 N. L. R. B. 99.
Matter of Bethlehem Steel Company ..... 50 N. L. R. B. 172.
Matter of Burns International Detective Agency ..... 50 N. L. R. B. 219.
Matter of Aluminum Company of America ..... 50 N. L. R. B. 233.
Matter of United States Cartridge Company ..... 50 N. L. R. B. 358.
Matter of Maryland Drydock Company ..... 50 N. L. R. B. 368.
Matter of Chicago District Electric Generating Corp. ..... 50 N. L. R. B. 376.
Matter of Aluminum Company of America ..... 50 N. L. R. B. 380.
Matter of Allen B. Du Mont Laboratories, Inc. ..... 50 N. L. R. B. 435.
Matter of Electric Boat Company ..... 50 N. L. R. B. 438.
Matter of City National Bank and Trust Company of Chicago ..... 50 N. L. R. B. 516.

Matter of Firestone Tire and Rubber Company of Calif. 50 N. L. R. B. 679.
Matter of Allied Chemical & Dye Corporation 50 N. L. R. B. 709.
Matter of Bethlehem Steel Company 50 N. L. R. B. 713.
Matter of Aluminum Corporation of America 50 N. L. R. B. 963.
Matter of Arvey Corporation 50 N. L. R. B. 999.
Matter of Continental Can Company 50 N. L. R. B. 1025.
Matter of Taylor Forge & Pipe Works 51 N. L. R. B. 48.
Matter of Wenatchee Alloys, Inc 51 N. L. R. B. 229.
Matter of Consolidated Steel Corporation, Ltd 51 N. L. R. B. 333.
Matter of Howard Aircraft Corporation 51 N. L. R. B. 386.
Matter of American Steel and Wire Company 51 N. L. R. B. 440.
Matter of United States Rubber Company 51 N. L. R. B. 532.
Matter of the Baldwin Company 51 N. L. R. B. 868.
Matter of Youngstown Sheet and Tube Company 51 N. L. R. B. 1261.
Matter of Dravo Corporation 52 N. L. R. B. 322.
Matter of Armour and Company of Delaware 52 N. L. R. B. 339.
Matter of Todd Shipyards Corporation 52 N. L. R. B. 356.
Matter of General Cable Corporation 52 N. L. R. B. 363.
Matter of Hudson Motor Car Company 52 N. L. R. B. 390.
Matter of American Steel Foundries 52 N. L. R. B. 432.
Matter of Caterpillar Tractor Co 52 N. L. R. B. 437.
Matter of The Standard Oil Company 52 N. L. R. B. 559.
Matter of American Bantam Car Company 52 N. L. R. B. 574.
Matter of United States Rubber Company 52 N. L. R. B. 587.
Matter of Atmospheric Nitrogen Corporation 52 N. L. R. B. 618.
Matter of Budd Wheel Company 52 N. L. R. B. 666.
Matter of Indiana and Michigan Electric Company 52 N. L. R. B. 679.
Matter of Foote Brothers Gear and Machine Corporation 52 N. L. R. B. 861.
Matter of Jones & Laughlin Steel Corporation 52 N. L. R. B. 975.
Matter of Anaconda Wire and Cable Company 52 N. L. R. B. 1028.
Matter of Bundy Tubing Company 52 N. L. R. B. 1224.
Matter of Diamond Magnesium Company 52 N. L. R. B. 1233.
Matter of Bethlehem Steel Company 52 N. L. R. B. 1265.
Matter of The Holtzer-Cabot Electric Co 52 N. L. R. B. 1400.
Matter of Carnegie-Illinois Steel Corporation 53 N. L. R. B. 65.
Matter of Bohn Aluminum and Brass Corporation 53 N. L. R. B. 231.
Matter of Fairchild Engine and Airplane Corporation 53 N. L. R. B. 305.
Matter of Aluminum Company of America 53 N. L. R. B. 482.
Matter of Nebraska Defense Corporation 53 N. L. R. B. 795.
Matter of Kellett Aircraft Corporation 53 N. L. R. B. 938.
Matter of Andover Motors Corporation 53 N. L. R. B. 1061.
Matter of United States Rubber Company 53 N. L. R. B. 1067.
Matter of Pittsburgh Plate Glass Company 53 N. L. R. B. 1181.
Matter of The Missouri Valley Bridge and Iron Company 53 N. L. R. B. 1207.
Matter of Ford Motor Company 54 N. L. R. B. 82.

Matter of Embry-Riddle Company ..... 54 N. L. R. B. 364.
Matter of Glenn L. Martin-Nebraska Company ..... 54 N. L. R. B. 424.
Matter of Fansteel Metallurgical Corporation ..... 54 N. L. R. B. 438.
Matter of Goodyear Aircraft Corporation ..... 54 N. L. R. B. 844.
Matter of Extruded Metals Defense Corporation ..... 54 N. L. R. B. 989.
Matter of Farrel Birmingham Company, Inc ..... 54 N. L. R. B. 948.
Matter of United States Aluminum Company ..... 54 N. L. R. B. 1067.
Matter of Bell Aircraft Corporation ..... 54 N. L. R. B. 1095.
Matter of Allis-Chalmers Manufacturing Company ..... 54 N. L. R. B. 1129.
Matter of American Smelting & Refining Company ..... 54 N. L. R. B. 1358.
Matter of Pacific Pump Works ..... 54 N. L. R. B. 1458.
Matter of William J. Burns International Detective Agency ..... 54 N. L. R. B. 1489.
Matter of American Finishing Company ..... 54 N. L. R. B. 1567.
Matter of Bell Aircraft Corporation ..... 54 N. L. R. B. 1578.
Matter of Sprague Specialities Company ..... 55 N. L. R. B. 47.
Matter of Miami Shipbuilding Corporation ..... 55 N. L. R. B. 123.
Matter of Phillips Petroleum Company ..... 55 N. L. R. B. 192.
Matter of Commonwealth Edison Company ..... 55 N. L. R. B. 465.
Matter of American Steel Foundries ..... 55 N. L. R. B. 960.
Matter of North American Aviation, Inc ..... 55 N. L. R. B. 1018.
Matter of Ryan Aeronautical Co ..... 55 N. L. R. B. 1111.
Matter of General Motors Corporation ..... 55 N. L. R. B. 1398.
Matter of The Murray Corporation of America ..... 55 N. L. R. B. 1434.
Matter of Great Lakes Corporation ..... 56 N. L. R. B. No. 49.
Matter of New Jersey Shipbuilding Corporation ..... 56 N. L. R. B. No. 63.
Matter of Berkey and Gay Furniture Co ..... 56 N. L. R. B. No. 111.
Matter of The Spang Chalfant Division of The National Supply Company ..... 56 N. L. R. B. No. 123.
Matter of The New York Quinine and Chemical Works, Inc ..... 56 N. L. R. B. No. 145.
Matter of Defoe Shipbuilding Company ..... 56 N. L. R. B. No. 140.
Matter of The National Supply Company ..... 56 N. L. R. B. No. 151.
Matter of Bankers Trust Company (Armed, non-military) ..... 56 N. L. R. B. No. 180.
Matter of Wilson and Company, Inc ..... 56 N. L. R. B. No. 220.
Matter of Bethlehem Steel Company ..... 56 N. L. R. B. No. 248.
Matter of Monsanto Chemical Company ..... 56 N. L. R. B. No. 254.
Matter of Airplane Mfg. and Supply Corporation ..... 56 N. L. R. B. No. 258.
Matter of Columbian Rope Company ..... 56 N. L. R. B. No. 282.
Matter of Standard Oil Company of N. J ..... 56 N. L. R. B. No. 280.
Matter of Swift and Company ..... 56 N. L. R. B. No. 307.
Matter of Ralston-Purina Company ..... 57 N. L. R. B. No. 13.
Matter of Bethlehem-Hingham Shipyards, Inc ..... 57 N. L. R. B. No. 37.
Matter of Standard Oil Co. of N. J ..... 57 N. L. R. B. No. 108.
Matter of Wyatt Metal and Boiler Works ..... 57 N. L. R. B. No. 118.
Matter of The Northern Coal and Dock Co. et al ..... 57 N. L. R. B. No. 122.
Matter of Duquesne Light Company ..... 57 N. L. R. B. No. 129.
Matter of Aluminum Co. of America ..... 57 N. L. R. B. No. 182.

Matter of Cincinnati Gas and Electric Company... 57 N. L. R. B. No. 159.
Matter of Union Stockyard and Transit Company.. 57 N. L. R. B. No. 244.
Matter of National Foundry and Machine Company... 57 N. L. R. B. No. 269.
Matter of Goodyear Aircraft Corporation... 57 N. L. R. B. No. 288.
Matter of Southport Petroleum Company of Delaware... 58 N. L. R. B. No. 9.
Matter of Swift and Company... 58 N. L. R. B. No. 22.
Matter of Cudahy Packing Company... 58 N. L. R. B. No. 37.
Matter of Radio Corporation of America... 58 N. L. R. B. No. 55.
Matter of Aluminum Company of America... 58 N. L. R. B. No. 140.
Matter of Dade Drydock Corporation... 58 N. L. R. B. No. 165.
Matter of Crucible Steel Company of America... 58 N. L. R. B. No. 195.
Matter of Pacific Tube Company... 58 N. L. R. B. No. 208.
Matter of National Carbide Corporation... 58 N. L. R. B. No. 281.
Matter of Mallinckrodt Chemical Works... 58 N. L. R. B. No. 282.
Matter of Plankington Packing Company... 59 N. L. R. B. No. 12.
Matter of Gar Wood Industries, Inc... 59 N. L. R. B. No. 17.
Matter of Iowa Packing Company... 58 N. L. R. B. No. 25.
Matter of The Firestone Tire and Rubber Company... 59 N. L. R. B. No. 118.
Matter of Armour and Company... 59 N. L. R. B. No. 156.
Matter of International Harvester Company... 59 N. L. R. B. No. 168.
Matter of Miami Shipbuilding Corporation... 59 N. L. R. B. No. 198.

U. S. GOVERNMENT PRINTING OFFICE: 1945

Order denying petition for rehearing

(Entered February 6, 1945)

The Motion of United Steelworkers of America filed January 8, 1945, for leave to intervene and file a brief is granted; the brief of International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America (UAW-CIO) filed January 8, 1945, as amicus curiae, is allowed; and the petition to rehear filed by National Labor Relations Board January 8, 1945, is denied.

Order amending opinion

(Entered February 10, 1945)

It is ordered by the court that its opinion, filed in these causes on December 8, 1944, be and is hereby amended as follows: (1) by striking from the second sentence of the fourth full paragraph appearing on page 2 thereof the subsection designation "a" and by substituting therefor the numeral "2" so that the sentence as amended now reads, "Here the Board must give consideration to Sec. 2 (2) and (3)"; and (2) by striking from the first sentence of the third full paragraph on page 7 thereof, the section designation "2" and substituting therefor the numeral "9," so that the sentence as amended now reads, "The Board, under Sec. 9 (b) had a positive duty to perform in the interest of the public."

United States Circuit Court of Appeals for the Sixth Circuit

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of National Labor Relations Board vs. Jones & Laughlin Steel Corporation, No. 9730, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed by name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 10th day of April A. D. 1945.

[SEAL] J. W. MENZIES,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

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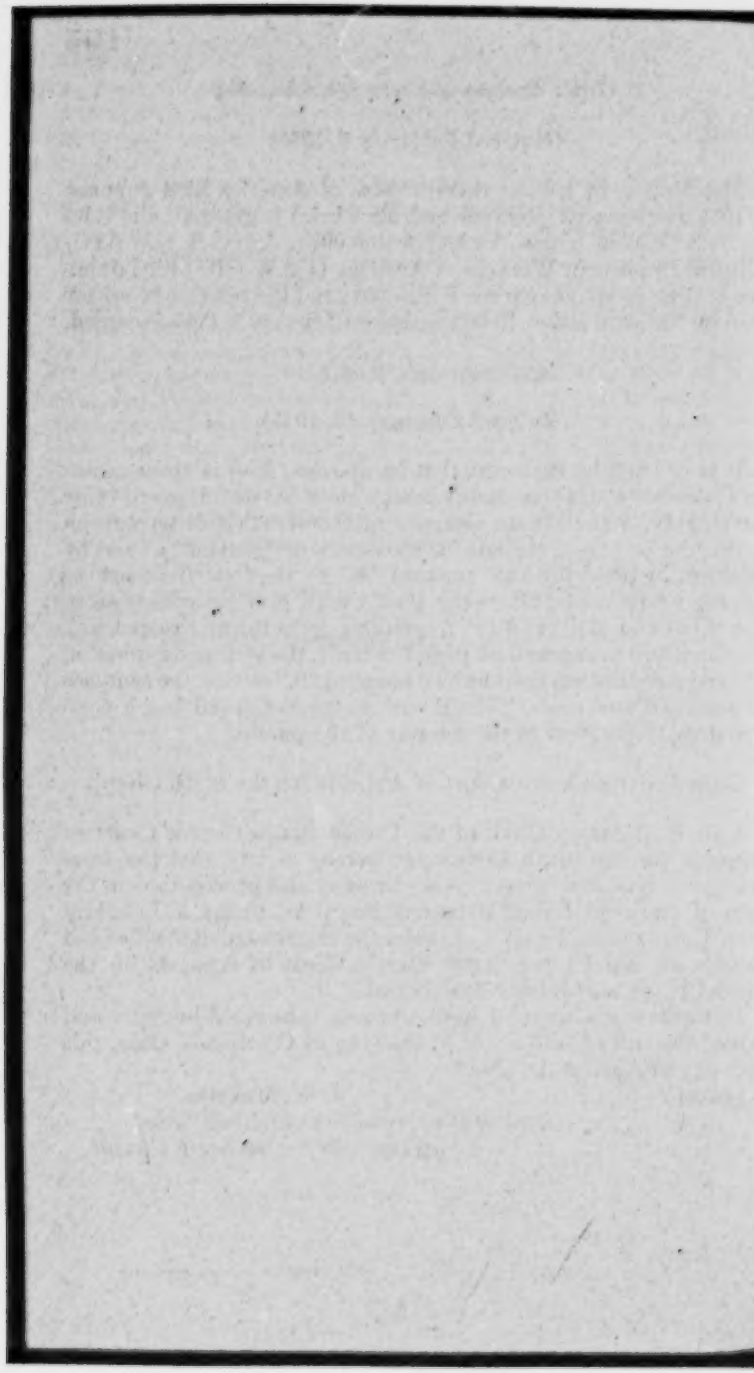

No. 1238

APPENDIX TO PETITIONER'S BR

FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

No. 8669

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

E. C. ATKINS AND COMPANY,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

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FILED
SEP 6 - 1944
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IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

National Labor Relations Board,
Petitioner,
vs.
E. C. Atkins and Company,
Respondent.
} 8669.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C. § 151, *et seq.*), respectfully petitions this Court for the enforcement of its order against respondent, E. C. Atkins and Company, Indianapolis, Indiana, and its officers, agents, successors, and assigns. The proceeding resulting in said order is known upon the records of the Board as "In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90 and their affiliate, Local 1683, Case No. 9-B-1200," and, "In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor, Case No. 9-C-1982."

In support of this petition, the Board respectfully shows:

(1) Respondent is an Indiana corporation, engaged in business in the State of Indiana, within this judicial circuit, where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act.

(2) Upon all proceedings had in said matter before the Board, as more fully shown by the entire record thereof certified by the Board and filed with this Court herein, to which reference is hereby made, the Board, on May 30, 1944,

issued a decision and order directed to the respondent, and its officers, agents, successors, and assigns.

The aforesaid order provides as follows:

Order.

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, E. C. Atkins and Company, Indianapolis, Indiana, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor, as the exclusive representative of all plant guards at its two Indianapolis plants, excluding the chief, lieutenants, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor, as the exclusive representative of all plant guards at its two Indianapolis plants, ex-

cluding the chief, lieutenants, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees or effectively recommend such action, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Post immediately in conspicuous places throughout its two Indianapolis plants, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a) and (b) of this Order, and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of this Order;

(c) Notify the Regional Director for the Ninth Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

(3) On May 30, 1944, the Board's decision and order was served upon respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Messrs. Barnes, Hickam, Pantzar & Boyd, 1313 Merchants Bank Building, Indianapolis, 4, Indiana, respondent's counsel.

(4) Pursuant to Section 10 (e) of the National Labor Relations Act, the Board is certifying and filing with this Court a transcript of the entire record in the proceeding before the Board, including the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the order made thereupon as set forth in paragraph (2) hereof, a decree enforcing in whole

said order of the Board, and requiring respondent, and its officers, agents, successors, and assigns, to comply therewith.

National Labor Relations Board,
/s/ Malcolm F. Halliday,
/s/ Malcolm F. Halliday,
Associate General Counsel.

Dated at Washington, D. C., this 24th day of August, 1944.

District of Columbia } ss.

Malcolm F. Halliday, being first duly sworn, states that he is Associate General Counsel of the National Labor Relations Board, petitioner herein, and that he is authorized to and does make this verification in behalf of said Board; that he has read the foregoing petition and has knowledge of the contents thereof; and that the statements made therein are true to the best of his knowledge, information and belief.

/s/ Malcolm F. Halliday,
Associate General Counsel.

Subscribed and sworn to before me this 24th day of August, 1944.

/s/ John E. Lawyer,
(Seal) *Notary Public, District of Columbia.*

My Commission Expires August 31, 1944.

UNITED STATES OF AMERICA.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Ninth Region.

In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90, and Their Affiliate Local 1683, Affiliated With the American Federation of Labor.	Case No. 9-C-1982.

CHARGE.

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that E. C. Atkins and Company at Plant No. 1—402 South Illinois Street, Plant No. 2—21st and Northwestern, Indianapolis, Indiana employing 56 workers in Guard Duty has engaged in and is engaging in unfair labor practices within the meaning of Section 8 subsections (1) and (5) of said Act, in that on December 20, 1943 it, by letter through its officers and agents, refused to bargain collectively with the authorized representatives of the International Association of Machinists, District 90, and their affiliated Local 1683 affiliated with the American Federation of Labor, a labor organization chosen by a majority of the plant guards at the company's two Indianapolis Plants, excluding the Chief and Lieutenants and all other supervisory employees with authority to hire, promote, discharge, discipline and otherwise effect changes in the status of employees or effectively recommend such action, in an election held under the auspices of the National Labor Relations Board on November 17, 1943, for collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment.

By the act set forth in the paragraph above, it, by its

officers and agents has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the said Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the full name, local number and affiliation of organization, and name and official position of the person acting for the organization.)

International Association of Machinists, District 90 and Their Affiliate Local 1683, affiliated with the American Federation of Labor,
by: Frank M. Richardson,
by: Frank M. Richardson,
Business Representative.
49½ South Delaware Street,
Indianapolis, Indiana.
MA. 8103.

Subscribed and sworn to before me this 22nd day of December, 1943, at Indianapolis, Indiana.

John C. Getreu,
John C. Getreu,
Field Examiner, Ninth Region.

BOARD EXHIBIT NO. 101-A.

UNITED STATES OF AMERICA.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Ninth Region.

In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90, and Their Affiliate Local 1683, Affiliated With the American Federation of Labor.	Case No. 9-C-1982.

COMPLAINT.

It having been charged by International Association of Machinists, District 90, and their affiliate Local 1683, 49½ South Delaware Street, Indianapolis, Indiana, affiliated with the American Federation of Labor, herein called the Union, that E. C. Atkins and Company, Indianapolis, Indiana, herein called the respondent, has engaged in and is now engaging in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, 49 Stat. 449, herein called the Act, the National Labor Relations Board, by the Acting Regional Director for the Ninth Region, as agent of the National Labor Relations Board, designated by the National Labor Relations Board Rules and Regulations—Series 3, Article IV, Section 1, hereby issues its complaint and alleges as follows:

1. E. C. Atkins and Company is a corporation organized and existing by virtue of the laws of the State of Indiana, with its principal office and places of business located in Indianapolis, Indiana, and has at all times herein mentioned continuously engaged at said places of business in the manufacture and sale of saws, tools, and armor plate.

2. The respondent, in the course and conduct of its business as aforesaid, causes and has continuously caused a substantial part of the materials and products used in its operations described above, to be delivered and transported in interstate commerce to its place of business in the State of Indiana, and causes and has continuously caused the greater part of the products manufactured, sold and distributed by it in its business as aforesaid, to be delivered and transported from its places of business in the State of Indiana to and through states of the United States other than the State of Indiana.

3. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

4. All plant guards at the two Indianapolis plants of the respondent, excluding the chief and lieutenants, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act, as found by the National Labor Relations Board in its Decision and Direction of Election of October 19, 1943, in the matter of E. C. Atkins and Company and International Association of Machinists, District 90, and their affiliate Local 1683, Case No. 9-R-1200.

5. On November 17, 1943, the employees in the appropriate unit described in paragraph 4 above, designated and selected the Union as their representative for the purposes of collective bargaining by a secret ballot election conducted under the supervision of the Acting Regional Director for the Ninth Region of the National Labor Relations Board, pursuant to the Decision and Direction of Election of the National Labor Relations Board of October 19, 1943, in the matter of E. C. Atkins and Company and International Association of Machinists, District 90, and their affiliate Local 1683, Case No. 9-R-1200. On November 29, 1943, the Union was certified as the representative for the purposes of collective bargaining of the employees in the above-described appropriate unit by the National Labor Relations Board pursuant to Section 9 (c) of the Act,

notice of which certification was duly given the respondent and the Union.

6. At all times since November 17, 1943, the Union has been the representative for the purposes of collective bargaining of the employees in said unit, and by virtue of Section 9 (a) of the Act, has been and now is the exclusive bargaining agent for all the employees in said unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

7. On or about December 14, 1943, and on numerous occasions thereafter, the Union requested the respondent to bargain with it as the exclusive representative of the employees in the unit described in paragraph 4 above, in respect to rates of pay, wages, hours of employment, and other conditions of employment.

8. On or about December 14, 1943, and at all times thereafter, the respondent refused, and has since continued to refuse, to bargain collectively with the Union as the exclusive representative of the employees in the unit described in paragraph 4 above.

9. By the acts described in paragraph 8 above, the respondent has engaged in and is thereby engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act.

10. By the acts described in paragraph 8 above, the respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them in Section 7 of the Act, and did thereby engage in and is thereby engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

11. The activities of the respondent described in paragraph 8 above, occurring in connection with the operations of the respondent described in paragraphs 1 and 2 above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes, burdening and obstructing commerce and the free flow of commerce.

12. The acts of the respondent as herein above set forth constitute unfair labor practices affecting commerce within

the meaning of Section 8 (1) and (5), and Section 2 (6) and (7) of the Act.

Wherefore, the National Labor Relations Board, on this 12th day of January, 1944, issues its complaint against E. C. Atkins and Company, the respondent herein.

UNITED STATES OF AMERICA.

Before the National Labor Relations Board,

Ninth Region.

In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90, and Their Affiliate Local 1683, Affiliated with the American Federation of Labor	Case No. 9-C-1982.

NOTICE OF HEARING.

Please Take Notice that on the 31st day of January, 1944, at 10:00 o'clock in the forenoon, in Room 216, Federal Building, Indianapolis, Indiana, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

A copy of the Charge upon which the Complaint is based is attached hereto.

You are further notified that you have the right to file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an answer to the said Complaint within ten (10) days from the service thereof.

Please Take Notice that duplicates of all exhibits which

are offered in evidence will be required unless, pursuant to request or motion, the Trial Examiner in the exercise of his discretion and for good cause shown, direct that a given exhibit need not be duplicated.

In Witness Whereof the National Labor Relations Board has caused this, its Complaint and Notice of Hearing, to be signed by the Acting Regional Director for the Ninth Region on this 12th day of January, 1944.

Rosemary S. Macke,
Rosemary S. Macke,
(Seal) *Acting Regional Director, National Labor Relations Board, Ninth Region.*

BOARD EXHIBIT NO. 101-E.

UNITED STATES OF AMERICA.

BEFORE THE NATIONAL LABOR RELATIONS BOARD,

Ninth Region.

In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90, and Their Affiliate Local 1683, Affiliated With the American Federation of Labor.	Case No. 9-C-1982.

ANSWER OF RESPONDENT, E. C. ATKINS AND COMPANY.

The Respondent, E. C. Atkins and Company, for answer to the Complaint herein, alleges as follows:

1. The Respondent admits the facts alleged in paragraph 1 of the Complaint.

2. The Respondent admits the facts alleged in paragraph 2 of the Complaint.

3. The Respondent denies the facts alleged in paragraph 3 of the Complaint; and affirmatively substantiates such denial with the allegation that the members of the Union are not "employees" within the meaning of Section 2 of the National Labor Relations Act, and its various subdivisions.

4. The Respondent denies the facts alleged in paragraph 4 of the Complaint; and affirmatively substantiates such denial with the allegation that the plant guards at the two Indianapolis plants of the Respondent are not "employees" within the meaning of Section 2 of the National Labor Relations Act, and its various subdivisions, and consequently cannot constitute a unit appropriate for the purposes of collective bargaining.

5. The Respondent admits that an election by secret ballot of certain of the plant guards at the two Indianapolis plants of the Respondent was held on November 17, 1943; and further admits that on November 29, 1943, the National Labor Relations Board certified the Union as the representative, for the purposes of collective bargaining, of such plant guards; but the Respondent denies that such secret ballot election was properly conducted, or that such plant guards were "employees" of the Respondent within the meaning of the word "employee," as used in Section 2 of the National Labor Relations Act, and its various subdivisions. The Respondent also admits that notice of the certification of the National Labor Relations Board was duly given the Respondent; but has no knowledge as to whether such notice was given the Union.

6. The Respondent denies the facts alleged in paragraph 6 of the Complaint.

7. The Respondent admits the facts alleged in paragraph 7 of the Complaint, except to the extent of the conclusion inferable therefrom that the "employees" therein described were employees of the Respondent within the meaning of that word as used in Section 2 of the National Labor Relations Act, and its various subdivisions.

8. The Respondent admits the facts alleged in paragraph 8 of the Complaint, except to the extent of the conclusion inferable therefrom that the "employees" therein described were employees of the Respondent within the

meaning of that word as used in Section 2 of the National Labor Relations Act, and its various subdivisions.

9. The Respondent denies the facts alleged in paragraph 9 of the Complaint.

10. The Respondent denies the facts alleged in paragraph 10 of the Complaint.

11. The Respondent denies the facts alleged in paragraph 11 of the Complaint.

12. The Respondent denies the facts alleged in paragraph 12 of the Complaint.

13. The Respondent further alleges that the Respondent is not, and cannot be, an employer within the meaning of Section 2 of the National Labor Relations Act, or any of its subdivisions, with respect to the "plant guards" referred to in the Complaint, because all of them were "auxiliary military police" under the jurisdiction and control of the Continuous Security District Office of the War Department of the United States of America, located in Cincinnati, Ohio; and because all such "auxiliary military police" were in the Federal Military Service at all times alleged in the Complaint.

14. The Respondent further alleges that the "employer" of the "plant guards," referred to in the Complaint, is the United States of America, and that consequently the Respondent cannot be their "employer" within the meaning of Section 2, subdivision 2 of the National Labor Relations Act.

15. The Respondent further alleges that the relationship of employer and employee, with its various incidents, has never existed as between the Respondent and the plant guards referred to in the Complaint, and that consequently the relationship between the Respondent and such plant guards is not subject to the jurisdiction of the National Labor Relations Board under any of the provisions of the National Labor Relations Act.

16. The Respondent further alleges that the Union purports to represent plant guards at various other plants in the Indianapolis area, which plant guards have not been sworn into the Military Service under the Articles of War; and the Respondent further alleges, upon information and belief, that the collective bargaining agreements executed

between the Union and the corporations at which such plant guards are stationed, respectively, contain provisions respecting seniority, discipline, handling of grievances, vacations, hours of work, and other incidents of tenure, which are incompatible with the Articles of War and military orders pursuant to which the auxiliary military police at the plants of the Respondent are subject to the jurisdiction of the Continuous Security District Office of the War Department of the United States of America, located in Cincinnati, Ohio; and that consequently any order directing the Respondent to bargain with respect to such incidents of employment with the plant guards at the plants of the Respondent is void and of no force and effect.

17. The Respondent further alleges that the hearing, which resulted in the Decision and Direction of Election of the National Labor Relations Board, entered October 19, 1943, was held without due process of law because of the denial, in part, of the Respondent's application for subpoenas *duces tecum* directed at F. M. Richardson, the Business Representative of the Union, to produce union records, and that consequently said Decision and Direction of Election is void and of no force and effect as against the Respondent.

18. The Respondent further alleges that the Decision and Direction of Election, entered October 19, 1943, and the Certification, entered by the Board on November 29, 1943, are void, because the National Labor Relations Board denied the repeated written requests of the Respondent for permission to appear before the Board and make argument of the issues raised by the Respondent; the Respondent never having been permitted to address argument respecting the Respondent's points to any member or representative of the Board, who prepared the Decision and Direction of Election, entered October 19, 1943, or the Certification, entered November 29, 1943.

19. The Respondent further alleges that the Certification of the National Labor Relations Board, entered November 29, 1943, is based in whole upon an investigation pursuant to Section 9, Subsection (c) of the National Labor Relations Act, and that the record of such investiga-

tion (including the Petition for Certification, Proof of Service thereof, Transcript of verbal testimony, and written exhibits, briefs, Decision and Direction of Election, and final Certification) evidences a denial of due process within the meaning of the Fifth Amendment to the Constitution of the United States; and the Respondent respectfully prays leave to incorporate all the objections and exceptions in such record by reference thereto, as defenses to the Complaint.

20. The Respondent further alleges that the record of investigation, referred to in the last preceding paragraph of this Answer, and the defenses, objections, and exceptions of the Respondent therein disclosed are material to the defense of the Respondent herein; and the Respondent therefore respectfully requests the National Labor Relations Board to produce the original copy of such record at the hearing upon the Complaint.

Wherefore, the Respondent respectfully prays that the Complaint herein be dismissed.

E. C. Atkins and Company,
Respondent,
By Henry C. Atkins Jr.,
Vice-President.

Messrs. Barnes, Hickam, Pantzer & Boyd,
Attorneys for Respondent,
1313 Merchants Bank Building,
Indianapolis, Indiana.
Kurt F. Pantzer,
Lewis D. Spencer,
Of Counsel.
Dated January 27, 1944.

State of Indiana, }
County of Marion. } ss:

Henry C. Atkins, Jr., being first duly sworn, upon his oath says:

That he is a Vice-President of E. C. Atkins and Company, the Respondent in the "Answer of Respondent, E. C. Atkins and Company," which precedes this jurat; that he

has read such Answer; and that the facts therein are true as he verily believes.

Further the affiant saith not.

Henry C. Atkins Jr.

Subscribed and sworn to before me, a Notary Public in and for said county and state, this 27th day of January, 1944.

Thelma Blessing,
Thelma Blessing,
(Seal) *Notary Public.*

My commission expires June 5, 1947.

Received Jan. 28, 1944, N. L. R. B., Ninth Region, Cincinnati.

UNITED STATES OF AMERICA.

Before the National Labor Relations Board.

In the Matter of: E. C. Atkins and Company and International Association of Machinists, District 90, and Their Affiliate Local 1683, affiliated with the American Federation of Labor.	Case No. 9-C-1982.

DECISION AND ORDER.

On February 19, 1944, the Trial Examiner issued his Intermediate Report in the above-entitled proceeding, finding that the respondent had engaged in and was engaging in certain unfair labor practices affecting commerce, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the respondent duly filed exceptions to the Intermediate Report

and supporting briefs. Pursuant to notice, oral argument, in which the respondent and the Union participated, was held before the Board in Washington, D. C., on May 11, 1944.

The Board has considered the rulings of the Trial Examiner, and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the respondent's exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the following addition:

The respondent contends that the guards involved in this proceeding are no longer the respondent's employees, but are employees of the United States of America by reason of having become civilian auxiliaries of the Military Police. We find this contention without merit. The United States of America does not claim that the guards are its employees. On the contrary, the agreement which each guard signs with the United States of America in order to obtain or retain employment with the respondent states in part as follows:

> • • • I, [name of guard], who have been or am about to be employed by [the respondent] as a guard at [the respondent's Indianapolis plants] for the purpose of guarding certain war material, war premises, and war utilities, in consideration of my employment or the continuation of my employment, do agree with the United States of America that • • • I am subject to military law during the period of my employment.

The record shows that the guards are interviewed for employment by the respondent and not by the United States of America, and are hired by the respondent; that their discharge is ordinarily initiated by the respondent; and that during their employment they are paid by the respondent, at rates set by the respondent and not by the United States of America. According to Chief Guard Henry A. Johnston, a witness called by the respondent in the hearing in the representation case, he is in command of all the guards at one of the plants and works "very

closely" and "cooperates" with the respondent's representatives. Moreover, Johnston admitted that the respondent could temporarily suspend a guard from duty. Cyrus E. Wood, the respondent's personnel director, who corroborated Johnston's testimony as related above, referred to the guards at the plants involved as the respondent's employees, and further testified that the respondent makes the "necessary pay roll deductions" before paying them their wages.

However, counsel for the respondent claimed at the oral argument before the Board that since the respondent could act for the most part only in an advisory and tentative manner, subject to the paramount approval or disapproval of the appropriate military authorities, the respondent retained virtually no control over the guards, and that there were virtually no subjects remaining on which it could bargain collectively with the guards' duly selected representative. It is true that for reasons of national security the respondent may have surrendered to the military authorities many of the attributes of control which it would normally possess over its plant guards. It is clear, however, that the respondent still retains a sufficient residual measure of control over the terms and conditions of employment of the guards so that the guards should not be deprived of the rights guaranteed in the Act. Under the circumstances and upon the entire record, we find, as we did in the preceding representation case, that the guards are employees of the respondent.[1]

---

1. See *Matter of Chrysler Corporation, Highland Park Plant*, 44 N.L.R.B. 881, 885, where we stated in part as follows:

> The War Department has recently * * * [made] plant-protection employees at plants producing war materials civilian auxiliaries of the military police. Under appropriate Army supervision, they are being trained and equipped to meet the additional responsibility placed upon them. The Company contends that, even if their ordinary duties do not bar them from rights guaranteed under the Act, this military regulation changes their employment status and that they are no longer "employees" within the meaning of the Act. We do not agree.

Order.

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, E. C. Atkins and Company, Indianapolis, Indiana, and its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor, as the exclusive representative of all plant guards at its two Indianapolis plants, excluding the chief, lieutenants, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor, as the exclusive representative of all plant guards at its two Indianapolis plants, excluding the chief, lieutenants, and all other supervisory employees with authority to hire, promote, discharge, discipline, or other-

wise effect changes in the status of employees or effectively recommend such action, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Post immediately in conspicuous places throughout the two Indianapolis plants, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating: (1) that the respondent will not engage in the conduct from which it is ordered to cease and desist in paragraphs 1 (a) and (b) of this Order, and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of this Order;

(c) Notify the Regional Director for the Ninth Region in writing, within ten (10) days from the date of this Order, what steps the respondent has taken to comply herewith.

Signed at Washington, D. C., this 30th day of May 1944.

Gerard D. Reilly,
Member,

John M. Houston,
Member,

(Seal) *National Labor Relations Board.*

UNITED STATES OF AMERICA.

BEFORE THE NATIONAL LABOR RELATIONS BOARD,

Trial Examining Division,

Washington, D. C.

In the Matter of: E. C. Atkins and Company and International Association of Machinists, District 90, and Their Affiliate Local 1683, affiliated with the American Federation of Labor.	Case No. 9-C-1982.

Messrs. Thomas E. Shroyer and Allen Sinsheimer, Jr., for the Board.

Messrs. Kurt F. Pantzer, and Lewis D. Spencer, of Indianapolis, Indiana, for the respondent.

Messrs. F. M. Richardson, Carl Cedarquist, and William J. Layton, of Indianapolis, Indiana, and Mr. Van B. Carter, of Cincinnati, Ohio, for the Union.

INTERMEDIATE REPORT.

Statement of the Case.

Upon a charge duly filed on December 23, 1943, by the International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor, herein called the Union, the National Labor Relations Board, herein called the Board, by the Acting Regional Director for the Ninth Region (Cincinnati, Ohio), issued its complaint dated January 12, 1944, against E. C. Atkins and Company, herein called the re-

spondent, alleging that the respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (5) and Sections 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act. A copy of the complaint, accompanied by notice of hearing, was duly served upon the respondent and the Union.

With respect to the unfair labor practices, the complaint alleged in substance: (1) that all plant guards at the two Indianapolis plants of the respondent, excluding the chief and lieutenants and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining; (2) that on November 29, 1943, the Board certified the Union as the exclusive representative of the employees of the respondent in such unit; (3) that on or about December 14, 1943, and at all times thereafter the respondent, although duly requested, refused to bargain collectively with the Union as the exclusive representative of all its employees in the said appropriate unit; and (4) that by such refusal the respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

On January 27, 1944, the respondent filed its answer admitting certain allegations of the complaint concerning its business operations and the proceedings of the Board leading to the certification of the Union, but denying that its plant guards are employees within the meaning of the Act and also denying that it has committed any unfair labor practices. The paragraphs from the respondent's answer which set forth its affirmative contentions are here quoted in full:

> 13. The Respondent further alleges that the Respondent is not, and cannot be, an employer within the meaning of Section 2 of the National Labor Relations Act, or any of its subdivisions, with respect to the "plant guards" referred to in the Complaint, because all of them were "auxiliary military police" under the jurisdiction and control of the Continuous Security

District Office of the War Department of the United States of America, located in Cincinnati, Ohio; and because all such "auxiliary military police" were in the Federal Military Service at all times alleged in the Complaint.

14. The Respondent further alleges that the "employer" of the "plant guards," referred to in the Complaint, is the United States of America, and that consequently the Respondent cannot be their "employer" within the meaning of Section 2, subdivision 2 of the National Labor Relations Act.

15. The Respondent further alleges that the relationship of employer and employee, with its various incidents, has never existed as between the Respondent and the plant guards referred to in the Complaint, and that consequently the relationship between the Respondent and such plant guards is not subject to the jurisdiction of the National Labor Relations Board under any of the provisions of the National Labor Relations Act.

In its decision[1] in the representation case upon which the Board's complaint relies for the establishment of the Union's position, as the statutory representative of the employees in an appropriate unit, the Board said:

> The Company agrees with the scope of the unit but contends that such a unit is not an appropriate one since plant guards who are all auxiliaries of the military police, are not employees within the meaning of the Act. This contention has been advanced in other cases[2] and has been found untenable. • • • No facts or arguments are presented here which would warrant departing from our prior decisions; accordingly the Company's contention is rejected.

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1. *Matter of E. C. Atkins and Company* and *International Association of Machinists, District 90 and their affiliated local 1685*, 52 N.L.R.B. 1470. The entire record in this case was incorporated by reference in the instant proceeding. This fulfills the request of the respondent in paragraph 19 of its answer for "leave to incorporate all the objections and exceptions in such record by reference thereto, as defenses to the complaint."

2. The Board cited: *Matter of Chrysler Corporation, Highland Park Plant*, 44 N.L.R.B. 881; *Matter of Phelps Dodge Copper Products Corp.*, 41 N.L.R.B. 973; and *Matter of Dravo Corporation*, 52 N.L.R.B. 322.

Two other contentions advanced by the respondent in its answer have also heretofore been disposed of by the Board. The respondent contends that the Board's Decision and Direction of Election and the Certification are void, "because the [Board] denied the repeated written requests of the respondent for permission to appear before the Board and make argument of the issues raised by the respondent." The Board in its Decision denied such a request for oral argument and in disposing of the respondent's Petition for Reconsideration of the Decision again denied a request for oral argument.

Again the respondent contends in its answer that "the hearing was held without due process of law because of the denial, in part, of the Respondent's application for *subpenas duces tecum* • • • and that consequently said decision and direction of election is void and of no force and effect against the Respondent." The Board in its decision affirmed this ruling of the Trial Examiner. Hence this matter has been disposed of except for additional requests presented in the present proceedings calling for copies of collective bargaining agreements between the Union and employers in the Indianapolis area and for records of proceedings had thereunder. These requests were denied by the undersigned[3] as similar in content and purpose to requests the denial of which are affirmed by the Board.

Pursuant to notice, a hearing was held at Indianapolis, Indiana, on January 31, 1944, before Charles E. Persons, the undersigned Trial Examiner duly designated by the Chief Trial Examiner. The Board and the respondent were represented by counsel and the Union by certain of its officials. All parties participated in the hearing. Full opportunity to be heard, to examine, and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. At the close of the hearing all parties waived their right to participate in oral argument before the Trial Examiner and to present briefs for his consideration.

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3. Through error this ruling does not appear in the transcript of testimony. It is here repeated *nunc pro tunc.*

Upon the entire record in the case, and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact.

I. The business of the respondent.[4]

E. C. Atkins and Company, the respondent, is an Indiana corporation, having its principal offices in Indianapolis where it operates two plants, engaged in the manufacture and sale of saws, tools, and armor plate.

The principal raw materials used in such manufacturing are steel, castings and lumber. During the calendar year 1943 the raw materials purchased cost in excess of $500,000. Approximately 80 percent[5] of such raw materials are purchased and shipped in interstate commerce from points outside the State of Indiana.

In the same period the gross sales of the respondent to the United States Government and to jobbers, dealers, subcontractors and direct to manufacturing consumers, were in excess of $1,000,000. Approximately 80 percent in value of such products were shipped by rail and truck to customers outside the State of Indiana.

During the calendar year 1944, to the date of this hearing, the manufacturing and selling operations of the respondent have continued substantially along the same lines as in 1943.

The respondent advertises through industrial magazines and periodicals.

The respondent concedes that it is engaged in commerce within the meaning of the Act.

II. The organization involved.

Plant Protection Lodge No. 1683 is a labor organization whose membership is confined to plant guards in the Indianapolis area. It is affiliated, through District No. 90,

4. These findings are based on a stipulation of the parties incorporated in the record and on allegations in the complaint admitted by the respondent in its answer.

5. The transcript of testimony incorrectly reported this percentage as "eight." The undersigned hereby orders that the transcript on page 20, line 1 be corrected by substituting eighty for "eight."

with the International Association of Machinists which, in turn, is affiliated with the American Federation of Labor. Local 1683 admits to its membership plant guards employed by the respondent.

III. The unfair labor practices.

A. Background.

The respondent's main plant in Indianapolis covers two entire city blocks and has been in operation since 1857. The Federal Government built and equipped the Fall Creek Ordnance Plant which is operated by the respondent under lease. Since 1937 the United Steel Workers of America, C.I.O. and the respondent have maintained contractual relations covering in general all production workers in both plants but excluding certain craft groups and plant guards. This contract currently provides for a union shop and covers over 1,200 employees. The sawsmiths are a highly skilled group. In the two plants about 60 are employed. They are closely organized in Sawsmiths Local Union No. 18,548 affiliated with the A. F. of L. and have had collective bargaining agreements with the respondent "for a number of years."[6] Their current contract provides for a closed shop.

Plant Protection Lodge No. 1683 was chartered by the International Association of Machinists on April 2, 1943. When a claim to represent a majority of the Plant Protection employees of the respondent, presented by letter dated August 18, 1943, was ignored, the Union on September 14, 1943, petitioned the Board for Investigation and Certification of Representatives. After hearing on September 24, 1943, the Board issued its Decision and Direction of Election on October 19, 1943. An election was duly held on November 17 in the appropriate unit defined by the Board in its decision. The Union received a majority of the votes cast. Accordingly the Board on November 29, 1943, "certified that International Association

6. See Matter of *E. C. Atkins and Company* and *United Steel Workers of America, Local 1543*, C.I.O., 47 N.L.R.B. 479.

of Machinists, District 90 and their affiliate, Local 1683 has been designated * * * as the exclusive representative of all such employees for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment."

B. The refusal to bargain collectively with the Union.

1. The appropriate unit and representation by the Union of a majority therein.

The complaint alleges that all plant guards at the two Indianapolis plants of the respondent, excluding the chief and lieutenants, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act. This is the appropriate unit found by the Board in its Decision and Direction of Election. The Company does not contest either the combining of the two plants in a single unit or the various inclusions and exclusions in the defined unit.

As noted above an election was held on November 17, 1943, under the Board's supervision. Of 55 valid votes counted, 50 were for and 5 against International Association of Machinists, District 90, and their affiliate Local 1683. No objections to the Regional Director's report on this election was filed by any party.[7] On November 29, 1943, the Board accordingly certified the Union as the statutory representative of the employees in the appropriate unit defined in its Decision. No contention was advanced in the present proceeding attacking the Board's

7. Paragraph 5 of the respondent's answer contains the statement: "the Respondent denies that such secret ballot election was properly conducted." When questioned at the hearing as to the connotation intended, respondent's counsel replied: "There is no connotation intended by that language that the election was conducted other than in a very fair and accurate way and that the ballots were cast as shown by the certificate; that the ballots were counted and that the results were as shown. In other words, on the matter of fairness of the election, there is no contention."

allegation, that the Union is still the representative of the majority of the employees in the appropriate unit. The undersigned finds that the Union is the representative of a majority of the employees in the said unit.

The undersigned finds in accordance with the Board's previous determination of the unit question and its certification of the Union that all plant guards at the respondent's Indianapolis plants, excluding the chief and lieutenants and all other supervisory employees with authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees, or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act. It is further found that the International Association of Machinists, District 90, and their affiliate, Local 1683 is and has been at all times since November 29, 1943, the statutory representative of the employees within the appropriate unit.

2. The refusal to bargain.

At some time between December 1 and 20, 1943, the Union sent to the Company by mail a copy of a proposed agreement. Although the document was not accompanied by a covering letter the respondent agrees that its presentation was, in effect, a request for collective bargaining.[8]

Under date of December 20, 1943, the respondent through Cyrus E. Wood, its personnel director, wrote Richardson as business representative of the Union, acknowledging receipt of the proposed agreement, and calling attention to the respondent's contention that auxiliary military police were in no sense employees of the respondent. The final paragraph of this letter read: "Under the circumstances may we suggest that you take such other action as you see fit to establish our obligation to bargain with you respecting such auxiliary military police."

8. Respondent's counsel said: "Quibbling is possible, but I should say that even if the Company has not had much experience with such requests, the attorney for the Company has had, and the attorney for the Company should have advised the Company that it was such a request."

Answering paragraph 8 of the complaint which alleges that "on or about December 14, 1943, and at all times thereafter, the respondent refused, and has since continued to refuse, to bargain collectively with the Union as the exclusive representative of the employees in the unit described," the respondent "admits the facts alleged" in this paragraph of the complaint, "except to the extent of the conclusion inferable therefrom that the "employees" therein described were employees of the respondent within the meaning of that word as used in the [Act]." Near the close of the hearing in the present proceeding respondent's counsel stated "That the respondent will, if it is finally determined that the respondent's contention as to the definition of the word "employee" is incorrect, gladly bargain with the Union in this case."

On all of the above, the undersigned finds that on December 20, 1943, and at all times thereafter, the respondent refused to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit, and that the respondent has thereby interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act.

IV. The effect of the unfair labor practices upon commerce.

The activities of the respondent set forth in Section III above, occurring in connection with the operations of the respondent described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy.

Having found that the respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

The undersigned has found that the respondent has refused to bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit. In order to effectuate the policies of the Act, the undersigned will recommend that the respondent, on request, bargain collectively with the Union as the exclusive representative of its employees within the unit herein found to be appropriate.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the undersigned makes the following:

Conclusions of law.

1. International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor is a labor organization within the meaning of Section 2 (5) of the Act.
2. All plant guards at the two Indianapolis plants of the respondent, excluding the chief and lieutenants and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, at all times material herein have constituted a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.
3. International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor was on November 29, 1943, and at all times thereafter has been, the exclusive representative of all employees in said unit for the purposes of collective bargaining, within the meaning of Section 9 (a) of the Act.
4. By refusing on December 20, 1943, and at all times thereafter to bargain collectively with International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor as the exclusive representative of its employees in the appropriate unit, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (5) of the Act.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8 (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

Recommendations.

Upon the basis of the above findings of fact and conclusions of law and upon the entire record in the case the undersigned recommends that the respondent, E. C. Atkins and Company, Indianapolis, Indiana, and its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor as the exclusive representative of all plant guards at its two Indianapolis plants, excluding the chief and lieutenants and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action;

(b) Engaging in any like or related acts or conduct interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Upon request bargain collectively with International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor, as the exclusive representative of all plant guards at its two Indianapolis plants, excluding the chief and lieutenants and all other supervisory employees with authority to hire, promote, discharge, discipline, or other-

wise effect changes in the status of employees, or effectively recommend such action, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Post immediately in conspicuous places throughout its two Indianapolis, Indiana plants and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to the employees stating: (1) that the respondent will not engage in the conduct from which it is recommended that it cease and desist in paragraph 1 (a) and (b) of these recommendations; and (2) that the respondent will take the affirmative action set forth in paragraph 2 (a) of these recommendations;

(c) Notify the Regional Director for the Ninth Region in writing within ten (10) days from the receipt of this Intermediate Report what steps the respondent has taken to comply herewith.

It is further recommended that unless on or before ten (10) days from the receipt of this Intermediate Report the respondent notifies said Regional Director in writing that he has complied with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondent to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board, Series 3, effective November 26, 1943, any party or counsel for the Board may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Rochambeau Building, Washington, D. C. an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. Immediately upon the filing of such statement of exceptions and/or brief, the party or counsel for the Board filing the same shall serve a copy thereof upon each of the other parties and shall file a copy with the Regional Director. As further

provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing within ten (10) days from the date of the order transferring the case to the Board.

Charles E. Persons,
Charles E. Persons,
Trial Examiner.

Dated: February 19, 1944.

UNITED STATES OF AMERICA.

BEFORE THE NATIONAL LABOR RELATIONS BOARD.

In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90 and their affiliate, Local 1683.	Case No. 9-R-1200.

Mr. Kurt F. Pantzer and Mr. Lewis D. Spencer, of Indianapolis, Ind., for the Company.

Mr. F. M. Richardson and Mr. Walter B. Heisel, Jr., of Indianapolis, Ind., for the Union.

Mr. Joseph E. Gubbins, of counsel to the Board.

DECISION
and
DIRECTION OF ELECTION.

Statement of the Case.

Upon petition duly filed by International Association of Machinists, District 90 and their affiliate, Local 1683, herein called the Union, alleging that a question affecting commerce had arisen concerning the representation of employees of E. C. Atkins and Company, Indianapolis, In-

diana, herein called the Company, the National Labor Relations Board provided for an appropriate hearing upon due notice before Thomas E. Shroyer, Trial Examiner. Said hearing was held at Indianapolis, Indiana, on September 24, 1943. The Company and the Union appeared, participated, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. The Company made a motion to dismiss the petition on the ground that plant-protection employees are not employees within the meaning of the National Labor Relations Act. The Trial Examiner reserved ruling. For reasons appearing below, this motion is denied. The Trial Examiner's rulings made at the hearing are free from prejudicial error and are hereby affirmed. All parties were afforded opportunity to file briefs with the Board. Subsequent to the hearing, the Company requested oral argument before the Board. The request is hereby denied.

Upon the entire record in the case, the Board makes the following:

Findings of Fact.

I. The business of the Company.

E. C. Atkins and Company, an Indiana corporation, is engaged at Indianapolis, Indiana, in the manufacture and sale of saws, tools, and armor plate. The Company operates two plants, both of which are located in Indianapolis Indiana, and both of which are involved in this proceeding. During the year 1942 the Company purchased raw materials valued in excess of $500,000, approximately 80 percent of which was shipped from points outside the State of Indiana. During the same period the Company sold finished products valued in excess of $1,000,000, approximately 80 percent of which was shipped to points outside the State of Indiana. The Company admits that it is engaged in commerce within the meaning of the Act.

II. The organization involved.

International Association of Machinists, District 90 and their affiliate, Local 1683, is a labor organization affiliated with the American Federation of Labor, admitting to membership employees of the Company.[1]

III. The question concerning representation.

On August 18, 1943, the Union by letter requested recognition as the exclusive bargaining agent for the Company's plant-protection employees. The Company failed to answer the letter. Subsequently, at a conference between the parties, the Company refused to recognize the Union claiming that the unit requested was inappropriate.

A statement prepared by a Field Examiner, introduced in evidence, indicates that the Union represents a substantial number of employees in the unit hereinafter found to be appropriate.[2]

We find that a question affecting commerce has arisen concerning the representation of employees of the Company within the meaning of Section 9 (c) and Section 2 (6) and (7) of the Act.

IV. The appropriate unit.

The Union contends that a unit consisting of all plant guards at the Company's two Indianapolis plants, excluding the chief and lieutenants constitute an appropriate unit. The Company agrees with the scope of the unit but contends that such a unit is not an appropriate one since plant guards, who are all auxiliaries of the military police, are not employees within the meaning of the Act. This contention has been advanced in other cases and has been

1. International Association of Machinists has requested the Board to take judicial notice of its reaffiliation with the A. F. of L.

2. The Field Examiner's statement shows that the Union submitted 51 authorization cards, all of which bear apparently genuine signatures, and 44 of which bear names of persons whose names are listed on the Company's pay roll of September 10, 1943; there are 63 persons within the appropriate unit.

found untenable.[3] More recently, in the *Dravo Corporation*[4] case, the Board fully discussed the question as to whether the militarization of guards alters the character of their employment, stating therein that the relationship of employer and employee still exists despite such militarization. No facts or arguments are presented here which would warrant departing from our prior decisions; accordingly, the Company's contention is rejected.

We find, that all plant guards at the Company's two Indianapolis plants, excluding the chief and lieutenants, and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

V. The determination of representatives.

We shall direct that the question concerning representation which has arisen be resolved by an election by secret ballot among the employees in the appropriate unit who were employed during the pay-roll period immediately preceding the date of our Direction of Election, subject to the limitations and additions set forth therein.

Direction of Election.

By virtue of and pursuant to the power vested in the National Labor Relations Board by Section 9 (c) of the National Labor Relations Act, and pursuant to Article III, Section 9, of National Labor Relations Board Rules and Regulations—Series 2, as amended, it is hereby

Directed that, as part of the investigation to ascertain representatives for the purposes of collective bargaining with E. C. Atkins and Company, Indianapolis, Indiana, an election by secret ballot shall be conducted as early as pos-

3. *Matter of Chrysler Corporation, Highland Park Plant*, 44 N. L. R. B. 881; *Matter of Phelps Dodge Copper Products Corp.*, 41 N. L. R. B. 973.

4. *Matter of Dravo Corporation*, 52 N. L. R. B., No. 12.

sible, but not later than thirty (30) days from the date of this Direction, under the direction and supervision of the Regional Director for the Ninth Region, acting in this matter as agent for the National Labor Relations Board, and subject to Article III, Sections 10 and 11, of said Rules and Regulations among the employees in the unit found appropriate in Section IV, above, who were employed during the pay-roll period immediately preceding the date of this Direction, including employees who did not work during said pay-roll period because they were ill or on vacation or temporarily laid off, and including employees in the armed forces of the United States who present themselves in person at the polls, but excluding any who have since quit or been discharged for cause, to determine whether or not they desire to be represented by International Association of Machinists, District 90 and their affiliate, Local 1683, for the purposes of collective bargaining.

Signed at Washington, D. C., this 19 day of October 1943.

Harry A. Millis,
Chairman,

John M. Houston,
Member,

(Seal)

National Labor Relations Board.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Ninth Region.

In the Matter of:
E. C. Atkins and Company

and

International Association of Machinists, District 90 and their affiliate, Local 1683.

} Case No. 9-R-1200.

Room 247, Federal Building,
Indianapolis, Indiana,
Friday, September 24, 1943.

The above-entitled matter came on for hearing, pursuant to notice, at 1:30 o'clock p m.

Before:

Thomas E. Shroyer, Trial Examiner.

Appearances:

Mr. Kurt F. Pantzer, 1313 Merchants Bank Building, Indianapolis, Indiana, and

Mr. Lewis D. Spencer, 1313 Merchants Bank Building, Indianapolis, Indiana, for E. C. Atkins and Company.

Mr. F. M. Richardson, 49½ South Delaware Street, Indianapolis, Indiana, and

Mr. Walter B. Heisel, Jr., 49½ South Delaware Street, Indianapolis, Indiana, for the International Association of Machinists.

* * * * *

6 Mr. Pantzer: I have. I wish to say that my motion at this time would be premature, and so I shall renew it at the close of all the evidence. The employer, E. C. Atkins and Company, moves to dismiss the petition for
7 investigation, which is included in Board's Exhibit 1, for the reason that E. C. Atkins and Company is not

and cannot be an employer within the meaning of Section 2, Subsection 2 of the National Labor Relations Act with respect to Auxiliary Military Police who wholly constitute the bargaining unit set forth in Item 4 of the Petition for Investigation, and further, for the reason that the employees referred to in such Petition cannot come within the definition of the word "employees" under the provisions of Section 2, Subsection 3 of the National Labor Relations Act with respect to the alleged employer, E. C. Atkins and Company, they are not in the sense in which the word "employee" is used in the Statute, the relationship of employer and employee with their various interests never having set in and not at this time existing.

* * * * *

8 Trial Examiner Shroyer: With regard to the Interstate Commerce data handed to the Examiner, will you now read that into the record, Mr. Pantzer?

Mr. Pantzer: "E. C. Atkins and Company (hereinafter referred to as the "Employer") is a corporation organized and existing under the laws of the State of Indiana, with two plants in Indianapolis, Indiana. The main plant in Indianapolis, which occupies two entire city blocks and is bounded on the north by South Street, on the west by Capitol Avenue, and on the east by Illinois Street, and on the south by Merrill Street, has been in operation since 1857. The Federal Government owns the new armor plate plant employed by the Employer in war production at the southeast corner of 21st Street and Northwestern Avenue.

"The Employer is engaged in the business of manufacturing and selling saws, tools and armor plate (hereinafter referred to as the 'Business of the Company').

"The facts bearing upon the question of whether the Employer is engaged in interstate commerce, and whether a question of representation affecting commerce arises, in this cause, are as follows:

"1. The principal raw materials used in the Busi-
9 ness of the Employer are steel, castings, and lumber (hereinafter referred to as the 'Raw Materials').

"2. Approximately eighty per cent (80%) of the Raw

Materials used in the Business of the Employer is purchased and shipped in interstate commerce from sources outside the State of Indiana.

"3. Approximately eighty per cent (80%) of the finished products produced by the Employer is sold in interstate commerce to purchasers outside the State of Indiana.

"4. During the calendar year 1942, the Raw Materials used in manufacturing the finished product of the Employer was in excess of $500,000.00.

"5. During the calendar year 1942, the gross sales price of the finished product sold by the Employer was in excess of $1,000,000.00.

"6. The Employer ships its finished products by rail and truck.

"7. The finished product of the Employer is disposed of to the United States Government, jobbers, dealers, subcontractors, and direct to manufacturing consumers.

"8. The Employer advertises through industrial magazines and periodicals.

"9. During the Calendar year 1943 to the date of
10 this hearing, the manufacturing and selling operations of the Employer have continued substantially along the same lines as those related, concerning the year 1942, in the preceding sections hereof.

E. C. Atkins and Company."

• • • • •

17 the Company until we were called before the Board. We were before the Board then and filed a petition for election and the union and the company met before the Board and the certification we have here was made out.

Trial Examiner Shroyer: I take it, Mr. Pantzer, that the Company still declines to recognize and bargain with the union?

Mr. Pantzer: That is correct.

• • • • •

19 WALTER C. GANN, called as a witness by and on behalf of International Association of Machinists, a union, being first duly sworn, was examined and testified as follows:

Trial Examiner Shroyer: Give your name and address to the reporter.

The Witness: Walter C. Gann, 331 South Wolcott street, Indianapolis.

20 *Direct Examination.*

Q. (By Mr. Richardson.) Where are you employed, Mr. Gann?

A. At E. C. Atkins and Company, 402 South Illinois Street.

Q. How long?

A. Since January 21, 1943.

Q. What is your position?

A. My position is as guard member of the Auxiliary Military Police.

Q. Are you acquainted with all the duties of guards?

A. I am.

Q. Do they all wear uniforms?

A. Yes, sir.

Q. They all carry guns?

A. Yes, sir.

Q. Have they been sworn in as Auxiliary Military Police?

A. Yes, I think they all have unless there be one or two new ones that haven't.

Q. That is the general procedure?

A. That is the general procedure—sworn in as soon as possible.

* * * * *

21 Q. Let me ask you a question here, if this is about guards' duties, do you watch the gates or entrances to the plants, and the exits? Do you maintain order, escort visitors, direct traffic, make out passes? Do guards make out passes?

A. No, the guards do not make out passes.

Q. Watch for suspicious circumstances around the plant?

A. That is right.

Q. And fire? You look out for fires, duties and things like that?

A. That's right.

Q. Now carry cash to the different places in the plant?

A. On certain posts we do. Not at all posts.

Q. That, in general, is about what constitutes the duties of the guard, isn't it?

A. That's right.

* * * * *

22 Q. Who hires the guard?

23 A. The personnel manager and the chief.

Trial Examiner Shroyer: What personnel manager?

The Witness: Our personnel manager.

Q. (By Mr. Richardson.) Of the Atkins company?

A. Of E. C. Atkins and Company.

Q. Who pays him?

A. E. C. Atkins and Company, as far as I know.

Q. Are you paid in checks?

A. Paid in checks.

Q. Signed by E. C. Atkins and Company?

A. That is right.

Q. Who has the authority to discharge you?

A. The personnel manager or the chief, I would think, of E. C. Atkins and Company.

Q. Who sets your rate of pay?

A. E. C. Atkins and Company

* * * * *

24 Q. Mr. Gann, at that time you executed an application for membership, is that right?

A. That's right.

Q. And that application was on a printed form which was available at the personnel office of E. C. Atkins and Company?

A. Yes, sir.

Q. How soon after that application was signed were

you assigned to military duty as an Auxiliary Military Police at the Atkins company plant?

A. The following day I went to work on the Auxiliary Police.

Q. You had never worked at the Atkins company place before that assignment?

A. No, sir.

Q. State whether or not it's the custom either before or shortly after the assignment of a new Military Policeman to duty to have him sign a contract with the United States Government, take the oath to defend the Constitution, and be sworn in by an officer of the United States Army?

* * * * *

27 Q. (By Mr. Pantzer.) Mr. Gann, in addition to signing the contract with the United States Government, which is Employer's Exhibit No. 2, you also were sworn in, is that right?

A. That's right.

Q. And in addition to that contract you took a verbal oath of office to support the Constitution of the United States in substance and the Military authorities?

A. Yes, sir.

Q. That oath was almost identical with certain of the language in the contract, is that not so?

A. That's right.

Q. Or do you recall?

A. Yes, that's right.

* * * * *

29 Q. Do I understand that you swore to observe and obey the Articles of War?

A. That's right.

30 Q. Do I understand that you swore to observe and obey the Articles and these Articles are read to you and that you are required to study them?

A. Yes.

Q. Where does that course of instruction take place?

A. We have military school each Monday for a period.

Q. Where is that situated? At the plant?

A. At the Ipalco Club Building. Indianapolis Power

and Light Building. Each Monday for a period of one hour.

Q. Located near the plant?
A. No, not near the plant.
Q. Under military supervision?
A. That is true.
Q. Who conducts the classes and instruction there?
A. An army lieutenant.
Q. Lt. Scanlon?
A. Lt. Scanlon.

* * * * *

33 Q. I now show you a document which is dated June 7, 1943, relating to the subject, The Auxiliary Military Police, and ask you to read paragraph No. 25, the first sentence. Is that the testimony you were at?

A. "A member of the Auxiliary Military Police may not be employed, dismissed, or may not resign, if the plant guard officer or other responsible army representative believes that the efficiency of this plant guard force would be impaired and declines to give his approval thereto."

Q. In other words, your employment on January 21 did not become effective until the Military Police had given their approval to that employment, is that not so?

A. Well, my employment started January 21, al-
34 though I wasn't inducted until August. My employment started on January 21, but I was not inducted until January 27, but my salary started from the date I was employed.

* * * * *

49 HENRY A. JOHNSTON, called as a witness by and on behalf of E. C. Atkins and Company, being first duly sworn, was examined and testified as follows:

Direct Examination.

50 Q. (By Mr. Pantzer.) Give your name and address?

A. Henry A. Johnston, RR1, Box 140, Zionsville, Indiana.

Q. You have stated your name and address for the reporter?

A. Yes, sir.

Q. When did you first take a position as an Auxiliary Military Police stationed at the main plant of E. C. Atkins and Company?

A. Well, sir, I went to work there in such capacity in August, last year, and sworn in shortly after by Lt. John Ritchie, of the United States Army.

Q. Had you ever worked at the Atkins company before?

A. No, sir, no.

Q. Did you, when you obtained your employment at the Atkins company, execute an application of employment?

A. Yes, sir, I filled one of those out, yes, sir.

Q. I show you Employer's Exhibit No. 5, being in blank form and ask you whether that is a copy of the application for employment which you then executed?

A. Yes, sir, that's it.

Q. Where was that application executed by you?

A. In the personnel office of E. C. Atkins and Company.

Q. That is the office where it employs regular employees who are in its production and maintenance work, is that right?

A. That's right, yes, sir.

51 Q. Was any representation made to you at the time you were employed that you would be finally accepted and sworn in to the Auxiliary Military Police?

A. No, sir. In fact, I was given to understand that then when I filled the application that it would not be effective without the approval of the United States Government.

Q. State whether or not to your knowledge that statement is made to all who apply for service as Auxiliary Military police at either of the Atkins plants?

A. Yes, I believe it is; if that is the case, if it is ever overlooked, it is forgotten, but that is the case.

Q. What is your position in the Auxiliary Military Police?

A. I am Chief of the Auxiliary Military Police.

Q. At which plant?

A. South Illinois Street plant.

Q. Main plant?

A. Yes, sir, main plant.

Q. How many lieutenants have you under you?

A. Four.

Q. How many Military Police do the five of you, including your four lieutenants, have under you at the main plant?

A. 32.

Q. Both men and women?

A. No, sir, just men at our plant.

52 Q. But some women are enrolled as Military Police in the ordnance plant?

A. Yes, sir, they are, I believe.

Q. After you signed the application for employment, did you, which is Employer's Exhibit No. 5, you were temporarily assigned to plant patrol work, is that right?

A. Yes, sir.

Q. But were not immediately sworn in?

A. No, sir.

Q. About how soon after you were assigned to work, were you sworn in?

A. It is on the record, could be found out exactly, roughly I would say three weeks.

* * * * *

55 Q. I note that on that certificate the rank has been left blank. What is your rank?

A. I am the Chief, sir.

Q. Is this the commission that was issued to you when you became chief?

A. Yes, sir.

Q. In other words, I note it is dated June 29, 1943, although you originally joined in 1942?

56 A. Yes, sir, that's right.

Q. At that time you were promoted to chief?

A. No, sir, I have been chief all along.

Q. You were hired as chief?

A. Yes.

* * * * *

57 Q. Whenever a man is discharged from the Military Police, who discharges him, the personnel office at E. C. Atkins and Company or the Military?

A. The Military discharges him from the Auxiliary

Military Police. Now there is one thing that should be
58 said there. He can be relieved of his duty temporarily by myself or by E. C. Atkins and Company, problematically for breaking some rule or otherwise proving that he is not doing his duty, he could be relieved temporarily but he could not be discharged by E. C. Atkins and Company.

• • • • •

63 Q. Do you take any orders from Mr. Wood who sits here in the court room and is the personnel director of E. C. Atkins and Company?

A. Yes, naturally, I work very closely with Mr. Wood, as he is personnel director of the plant and there can be much more efficient guarding of the plant and operation of the plant if we do work closely. I have never taken
64 an order as such from him.

Q. You try to cooperate?

A. I try to cooperate to the best of my ability and he does the same for me.

• • • • •

70 A. Yes, sir.

Q. With what weapon?

A. With a revolver.

Q. State whether or not the shifts of your guard at your plant rotate or whether they are always the same?

A. The shifts rotate every two weeks.

Q. What do you mean by rotate?

A. I mean that there is entirely—it is my idea, but it seemed a fair way to run it for our particular plant, that they all trade hours every so often and give each other an even break on it, so the 8-4 shift will work from eight until four in the day time for two weeks and then on a Sunday morning, starting at 8 o'clock in the morning, that shift of men will by and large gravitate to the 12-8 shift, upon which they will stay for two weeks, and on completion of that two weeks, they will revert back to the 4-12 shift, that is the idea, although we don't always go to the letter on that.

Q. That is your idea, is it?

A. Yes, sir, that is my idea.

Q. State whether or not the shifts of the regular pro-

duction and maintenance employees at the main plant of the Atkins company rotate?

A. No, sir, they don't rotate at all. They are frozen shifts.

71 Q. What you are doing is directly the opposite of what Mr. Wood in the Personnel Department does with the remaining production employees?

A. Yes, sir.

Q. Will you now kindly tell us a little bit more about the kind of instruction which you and your men under your commband have received from the Military Police and where that instruction was imparted?

A. Once a week on a Monday at the Ipaco on 16th and Alabama Street, we get one hour of instruction at the hands of the United States Army Corps of Military Police. That instruction is taught by a second lieutenant of the Military Police, under the direction of Capt. Wetenhall and his superior, Col. Rasmussen of the Continuous Superior District and subjects taken up are Military Police subjects only and attendant subjects. For instance, we have had a lot of instruction on judo, which is the art of self-defense. We have had instruction on the use of clubs and fists. We have had guiding law of instruction on pistol marksmanship and the general handling and care of them. We have had instruction on military courtesy by training films, methods of arrest by training films, and of disarmament of persons by training films, which are the property of the army and borrowed from the fort at Ft. Harrison in the state here and returned by the

72 lieutenant. They used sighting bars which are the property of Ft. Harrison showing the men how to sight their pieces (hold revolvers) for accuracy, and also there are other subjects such as fire control and prevention. That will give you a general idea. Some of the other subjects I can't recall just now. All Military Police subjects, everyone of them. We have also had close order drill, regular army close order drill on the floor, administered by the lieutenant and his assistants in which we all took part.

Q. What are your hours of work?

A. My own hours?

Q. Yes.

A. I work whenever I think—I work whatever hours I think are advisable to work. They are very scattered and go all around the clock.

Q. You are paid overtime after eight hours in one day?

A. No sir. I work on a straight salary basis. There is no cognizance at all taken of that when there are any extra hours.

Q. Do you on the average work more than eight hours a day?

A. Well—

Q. How much more?

A. Oh, on an average week after week, it might be ten hours—on an average week after week. Sometimes I work as high as sixteen and twenty and twenty-two, de-
73 pending on the day and time and circumstances.

Q. But that is left to your own initiative as a military officer?

A. Yes, sir.

Q. Subject nevertheless to any orders you may get from higher authority?

A. Yes, sir.

Q. Do you recognize any of the officials of the plant as such higher authority? By that, I mean of the company?

A. Not as authority, only that I am hired by the company to afford them protection and that means protection personally as well as protection for the property around them. Naturally they, the officers of the company, are very valuable property. I would regard them as the most valuable property we have to protect, but not as superiors. Anything we guards do—I might explain it in this way—if you look on the bottom of the large letter, you will see at the bottom the motto of the Auxiliary Military Police, "Production must not be interrupted." That is the rule by which we live. Anything that would tend to interrupt production, whether it would be tampering with machinery or personnel or anything else.

* * * * *

76 Q. Are you paid by check?

A. Yes, sir.

Q. Who signs the check?

A. E. C. Atkins and Company.

Q. What do you mean you are hired by the Government when E. C. Atkins and Company pays you?

A. They pay because the Government makes them pay me.

Q. Have you got any commission in the army?

A. No, not with the Government.

Mr. Richardson: That's all.

• • • • •

77 Q. Who made you the Chief?

A. I don't know. I was hired just like a regular guard with the idea that I would be Chief and after a certain length of time, I became Chief at the Okey of the army and the company.

• • • • •

81 CYRUS E. WOOD, called as a witness by and on behalf of E. C. Atkins and Company, being first duly sworn, was examined and testified as follows:

Trial Examiner Shroyer: Give your name and address to the reporter.

A. Cyrus E. Wood, 634 West Maple Road, Indianapolis, Indiana.

Direct Examination.

Q. (By Mr. Pantzer.) State, Mr. Wood, what your relation is to E. C. Atkins and Company, the employer in this case.

A. Personnel Director for the various plants of E. C. Atkins.

Q. How long have you been employed by the Atkins company?

A. 37 years this fall.

Q. How long have you been Personnel Director?

A. Seven years, actual. Previous to that time, about five years, I was known as Force Director, which eventually developed to the personnel work.

• • • • •

83 Q. How many of your employees at the main plant are plant guards or Auxiliary Military Police?

A. Thirty-two.

Q. When you say your employees, they are your employees only in the sense that you pay their wages, is that right?

A. That is correct.

Q. And you make the necessary pay roll deductions?

A. That's right.

• • • • •

88 Q. (By Mr. Pantzer.) Your relationships with the Saw Smiths' Union so far as it has been reduced to writing, is evidenced by these three documents, No. 18, 19, and 20?

A. That is correct.

Q. Before the Atkins company became engaged in defense work, will you kindly state how many watchmen were employed as employees by the Atkins company?

A. It varied from four to six. We had two night watchmen on patrol called clock men—made the rounds regularly through the plant and pulled the 82 boxes. The night clocks.

Q. You had four day men?

A. No, two day men at the gates. Frankly, they were, at that time that was a pensioner's job.

Q. You now have a total of Auxiliary Military Police of how many at both plants?

A. Sixty-four.

Q. This increase in the staff required to guard and protect the plant has been occasioned by the participation of the Atkins company in the war effort and the insistence of the Military that the plant be adequately protected against sabotage and similar happenings, is that right?

A. At the beginning of our participation in the
89 production of war materials; namely, armor plate, representatives from the Cincinnati office came into our plant and made a survey and gave us a recommendation of the requirements of the Government in so far as plant production would be considered and that was submitted in writing and complied with.

Q. When you say the Cincinnati office, you mean the Cincinnati Ordnance Office?

A. Ordnance Office.

Q. Are most of your contracts with the Ordnance Department?

A. We have had dealings in the past and have complied with the recommendations of both the army and navy. The major part of our control was of the army and at this time is practically all controlled by army interests.

Q. Was it the Ordnance Department that insisted upon your switching over from a watchman basis to an Auxiliary Military Police basis or was it the Military Police?

A. It was the army representatives from the Ordnance Department of Cincinnati, out of Col. Rasmussen's office that required it.

Q. As a result of that insistence the Auxiliary Military Police were employed?

A. That is correct.

Q. State whether or not, Mr. Witness, the Atkins company could retain any of its war contracts if it did not submit to the system of Auxiliary Military Police that
90 is now in force at the plants?

A. It is understood and the majority of contracts submitted, you will find the clause stating that unless proper protection of Government property is provided in compliance with certain directives, that will be issued from time to time, some of these special contracts will be or might be cancelled and fact of the matter is would be if we did not comply with the interests.

Q. You have heard the testimony of Chief Johnston on the stand with respect to the right of E. C. Atkins and Company to hire or discharge Military Police, is that right?

A. That's right.

Q. Is his testimony with respect to that correct?

A. It is correct.

Q. Is his testimony with respect to your being permitted to make recommendations but not being permitted to give orders respecting the duties of the Auxiliary Military Police correct?

A. It is correct.

Q. You have been able to work in cooperation with the Auxiliary Military Police?

A. We have, yes.

Q. Have you ever attempted to exercise any of the

authority which you are prohibited from exercising
91 by military orders over any of these sixty-four members of the Military Police?

A. Not to my knowledge.

Q. Or has any foreman or hiring officer or director of Atkins and Company attempted to exercise such a right?

A. No.

Q. Instructions have been promulgated, have they not, throughout the entire plant that the Military Police are the business and affairs of the military authorities?

A. That's correct. It is understood, sir.

* * * * *

94 Q. Do the Auxiliary Military Police wear such identification badges?

A. They do not.

Q. When a person applies for employment as an Auxiliary Military Policeman, where does he fill out the application from which Employer's Exhibit No. 5 is taken? Is that done in your office?

A. Yes, sir.

Q. Your office both in the main plant and the Fall Creek plant?

A. Yes.

Q. Do you have the authority to accept that application for the military authorities?

A. I can accept that only subject to the approval or
95 disapproval of the Cincinnati office. We select or rather we interview and select prospective guards. Those men are in turn, their names are submitted to the Cincinnati office along with the proper papers that are provided by the Government for them to fill out. By their approval they are permanently inducted into the Military Police group, or upon their rejection, they would be given their dismissal papers.

Q. When you say you select them, as a matter of fact, all you do is just to recommend the man to them?

A. I interview, but recommend them.

* * * * *

96 Trial Examiner Shroyer: Any further questions?
Mr. Richardson: Yes.

Cross-Examination.

Q. (By Mr. Richardson.) Mr. Wood, when employers on the guard force are hired, who sets the rate of pay?

A. The rate of pay was established when we filed
97 our schedule October 3, 1942, with the Wage and Hour Division.

Q. The company set that rate of pay at that time?

A. That's right.

* * * * *

RESPONDENT'S EXHIBIT NO. 2.

Agreement Between the United States of America and Plant Guard

In order that the existing military forces of the United States may be most effectively employed in combat activity against the enemies of the United States, the United States is approving the employment of certain guards as civilian auxiliary to the military police for the purpose of guarding and protecting war material, war premises and war utilities from injury or destruction by the enemy or otherwise, including the making of arrests, as peace officers for violation of Federal laws, as well as for violations of orders and regulations issued by military authority. The United States require that only persons physically fit, well trained in the use of arms and in the duties incident to their position, and of unquestionable loyalty to the United States be so employed.

Now, therefore, I, ..., who have been or am about to be employed by ..... as a guard at ..... for the purpose of guarding certain war material, war premises, and war utilities, in consideration of my employment or the continuation of my employment, do agree with the United States of America that:

(1) I will support and defend the Constitution of the United States against all enemies, foreign and domestic;

(2) I will bear true faith and allegiance to the Constitution of the United States;

(3) I will well and faithfully discharge my duty as a cilivian auxiliary to the military police to protect war material, was premises, and war utilities against all enemies, foreign and domestic, and will obey any orders issued in connection therewith by the President, as Commander-in-Chief of the Army and Navy of the United States, and by his duly authorized officers;

(4) I acknowledge that the appropriate Articles of War have been read and explained to me, and that in the performance of my duty to protect such war material, war premises, and war utilities, I am subject to military law during the period of my employment.

_____

Signature

_____

Witness

_____

Date

UNITED STATES OF AMERICA
AUXILIARY MILITARY POLICE
ARMY OF THE UNITED STATES
PLANT GUARD IDENTIFICATION CARD

This is to Certify that Henry A. Johnston has been voluntarily and duly enrolled as an Auxiliary to the Military Police for service with the Army of the United States at E.C.Atkins & Co., Indianapolis, Ind. and is subject to Military Law for the duration of the War or until official termination by the War Department of his services as an [illegible].

For the Commanding General, [illegible]

Date 8-3-43

Serial No. 126-ATE-016

B. R. WETENHALL
Capt. C. M. P.
District Plant Guard Officer
Cert. Serv. Dist. Off. Cincinnati, O.

Property of War Department:—To Be Returned to This Office Upon [illegible]

Information on Reverse Is Certified as Correct: Signature of Issuing Official

Signature of Person to Whom Issued

BIRTH DATE	HEIGHT	WEIGHT	EYES	HAIR	COMPLEX	SEX
5-26-06	5'10½"	155	Blu	Brn	Fai	M

SCARS OR MARKS Rgt. Elbow, skin
Lft. Caulifl. ear
wears glasses

Fingerprinted 8-24-42
U. S. Citizen by: Birth
ONLY FOR IDENTIFICATION
NOT A PASS

Henry A. Johnston

RIGHT THUMB PRINT

LEFT HAND PRINT

NATIONAL LABOR RELATIONS BOARD
CASE NO. R-1200 { BOARD / RESPONDENT } EXHIBIT NO. 3
IN THE MATTER OF E.C. Atkins & Co.
DATE 7-2-43 WITNESS [illegible]
ETHEL F. FISHER, Official Reporter
BY Aurora Hand

3/8

RESPONDENT'S EXHIBIT NO. 4.

War Department
CONTINUOUS SECURITY DISTRICT OFFICE
904 Enquirer Building
Cincinnati, Ohio

ACR/hc

To Insure Prompt Attention
In Replying Refer To
PPDB No. Sect. V-1
Plant Guard Section

Plant Protection Data Binder
Section V, Letter 1
Dated June 7, 1943

Subject: The Auxiliary Military Police

1. Executive Order No. 8972, dated December 12, 1941 authorizes the Secretary of War and the Secretary of the Navy, "to establish and maintain military guards and patrols, and to take other appropriate measures to protect from injury and destruction", certain strategic premises, materials, and utilities. In accordance therewith the Secretary of War directed the military organization of plant guard forces as Auxiliary Military Police.

2. These guard forces will be organized as a civilian Auxiliary to the Military Police in all plants producing war material important in the war effort.

3. At the time any guard force is organized, the Commanding Officer having jurisdiction over the force will:

a. Cause the Articles of War to be read and explained to each member of the guard force (see para. 18);

b. Issue orders and regulations setting forth the duties and responsibilities of the guard force;

c. Organize each guard force with a member of the Army of the United States in command and cause each force to be drilled and instructed with a view to supplementing the Army in resisting attack on war material, war premises and war utilities which the force is assigned to guard;

d. Require each member of the guard force to give a pledge of loyalty to the United States, and to execute an agreement acknowledging that such Articles of War are understood by him and that he is subject to military law as long as he remains a member of the guard force. (A copy of the Guard Agreement is attached, CIPP 124.)

Production Must Not Be Interrupted

CIPP 139-1

4. The purpose of organizing the plant guard force is to increase the authority, efficiency, and responsibility of the guard forces at plants important to the prosecution of the war, and through military training to provide auxiliary forces throughout the United States to supplement the Army in war time emergency situations.

5. Nothing in this letter will be construed as modifying the responsibility of the plant managements for providing adequate protection at all times against all hazards. The District Plant Guard Officer may, however, take appropriate action through the plant management to correct any condition deemed by him to result in or threaten defective or inadequate performance by the guard force of its ordinary protective duties.

6. The mission of a guard force of Auxiliary Military Police is:

a. To provide interior and exterior protection of the plant against sabotage and espionage and natural hazards.

b. To serve with the Army in providing the protection to the plant and its environs in emergency situations.

7. An emergency situation in which the Auxiliary Military Police may be called upon for military service may arise from flood, conflagration, or other disaster; internal disorders hazardous to property or production important to the prosecution of the war; protection from air raid; Fifth Column activity; paratroop attack or invasion; or it may arise from any other condition or circumstances involving the plant or its community.

8. A guard force, or any member thereof, whether on or off duty, may be assigned to duty in an emergency at

places other than the premises of the plant normally served, provided only that in the opinion of the District Plant Guard Officer or other representative of the Army in command such assignment will contribute to the protection of the guard force's own plant and its environs or to the protection of its production.

9. In addition to the regular plant guards other groups of employees may be inducted as members of the Auxiliary Military Police. The District Plant Guard Officer will determine which groups are eligible.

10. Persons such as firemen, watchmen, and women guards may be included, provided they are able physically

to perform the duties and missions of the Auxiliary Military Police described herein and in the agreement signed by the guards.

11. Women guards may be armed, but in view of the Congressional policy that women auxiliary forces be limited to non-combatant duty, it is recommended that in forming plans for any emergency situations requiring the use of force against the enemy such plans will provide for assignment of women Auxiliary Military Police to non-combatant activities.

12. No minimum number of guards is required for the militarization of any guard force. Guard forces, no matter how small, will be militarized if the plants which they guard are so located that the guards can be organized, trained and commanded efficiently by available Army personnel, and if in the opinion of the District Plant Guard Officer, the results obtainable are commensurate with the effort involved.

13. Employment of an alien as a plant guard must be approved by the Secretary of War in the same manner as employment of an alien having access to work on classified or aeronautical contracts.

14. The Provost Marshal General is charged with the general supervision of the activities relating to the Auxiliary Military Police as a part of the Internal Security pro-

gram. The commanding generals of the Service Commands are responsible for the military organization, training, and command of the guard forces at the plants and installations within their respective Service Commands and under their jurisdiction.

15. The Commanding General of the Fifth Service Command has designated the Chiefs of the Continuous Security Districts as the Commanding Officers in their various districts. They are also the "Commanding Officer having jurisdiction over the plant guard forces" of plants and installations at which there is no local resident commanding officer. They then appoint District Plant Guard Officers, who are in direct charge of plant guard forces of such plants in their districts. For each plant or group of plants at which there is no local resident Commanding Officer, a Plant Guard Officer will be designated by the District Plant Guard Officer. The Plant Guard Officer is the member of the Army of the United States in command of the guard force and will report direct to the District Plant Guard Officer.

CIPP 139-3

16. At each plant where there is a local resident Commanding Officer, this officer will be the Commanding Officer having jurisdiction over the guard force. He may serve as the Plant Guard Officer himself or cause another officer to be appointed as such.

17. If a plant at which the guard has been organized as Auxiliary Military Police is removed from the Service Command Responsibility List, the Commanding General of the Service Command will determine whether such guard force will be continued as Auxiliary Military Police and trained and commanded as before, or whether its status as such will be terminated.

18. Guard forces which are to be organized will be assembled at the earliest practicable date by the plant management at the request of the plant guard officer. At this assembly the Articles of War will be read and explained to each member of the guard force by the plant guard officer or, in his absence or unavailability, by some other com-

petent person who is an officer of the Army or civilian officer of the Auxiliary Military Police. As certain of the Articles of War are generally inapplicable to the Auxiliary Military Police, the foregoing directive will be considered complied with if articles 2, 58, 61-64, 66, 68-74, 76, 81-83, 85, 88-90, 92-94, 96, 104, 105 are read and explained. These articles define certain offenses punishable by court martial of which persons subject to military law may be guilty.

19. The Auxiliary Military Police, immediately after the Articles of War have been read and explained, will be impressed with the fact that the Government of the United States is interested in the security of the plant and its production, as essential to the successful prosecution of the war. To this end the plant guard officer will issue and post a guard order. Guard Order No. 1 will be posted at your plant. A copy of same is attached hereto. At the time of reading the Articles of War, each member of the guard force gives the pledge of loyalty to the United States and executes the plant guard agreement.

20. If a guard refuses to sign the agreement he may (but need not) be temporarily retained with the understanding that he will be dismissed as soon as he is replaced, and in any event within a reasonable time. The signed agreement will be retained by the District Plant Guard Officer. The guard force will be considered as a civilian auxiliary to the military police when 75 per cent of the guards at a given plant have signed the agreement. A certificate of membership in the Auxiliary Military Police will be issued to each member. Each plant guard who becomes a member of the Auxiliary Military Police continues as such until he is released by the War Department from his obligations. This will take place when competent military authority has approved of his dismissal or resignation or when he has been discharged without honor.

CIPP 139-4

21. Orders and regulations for the Auxiliary Military Police will be issued in the name of the Commanding Officer having jurisdiction over the guard forces. The Chief of

the Continuous Security District is the Commanding Officer of the plant guard forces in the District. At civilian operated plants such orders will be issued after plant management has indicated its concurrence by signing the guard order in the lower left hand corner.

22. The Auxiliary Military Police will continue to function as formerly; that is, as when they were employed by the plant only and were not also under the direction of the Army. However, a member of the Army of the United States will be in command at all times. He will be in command for purposes of instruction and drilling and, in particular, to take over the command of the force if and when an emergency justifying such action occurs. Although the plant guard officers will be in command at all times they will not supplant the civilian guard officers, and unless expediency demands otherwise, the plant guard officers will exercise their authority through the guard officers established by the plant management.

23. The Auxiliary Military Police are supplementing the Army of the United States in a vital task of protecting war material an war production facilities. Attempts to intimidate them or reduce or nullify their efficiency and interfere with the performance of their mission may constitute a violation of Federal as well as state criminal laws. Any and all such incidents are to be reported by the guard members to their chiefs and a detailed report will be made to the District Plant Guard Officer relative to each such incident.

24. Basically the militarization of the plant guard forces does not change the existing systems of hiring, compensation, and dismissal except as stated in paragraph 25. All remain, primarily, a matter between the guards and plant management. Guards in the employ of a private employer may as heretofore, be dismissed and those who were Civil Service employees in the employ of the War Department may be dismissed by the local commanding officer, in accordance with Civil Service Regulations. In neither case is a Court Martial necessary.

25. A member of the Auxiliary Military Police may not

be employed, dismissed, or may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto. Inasmuch as the guards are under oath to the Army, the plant

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management may suspend a guard without pay pending approval of his dismissal by the District Plant Guard Officer and pending the termination of the guards enrollment as a member of the Auxiliary Military Police. This will usually be done on the management's recommendation unless an emergency requires the guard's retention.

26. A Certificate of Meritorious Conduct will be issued to each member of the Auxiliary Military Police whose services are terminated honorably. In the event of termination of services under conditions other than honorable no such Certificate will be issued. A communication may be addressed to the individual whose services have thus been terminated stating only the fact of termination and that the communication is not a Certificate of Meritorious Conduct.

27. The status of the employer in regard to the employee benefits for the guard force is not changed. For example, Social Security, Workmen's Compensation, Employer's Liability and vacation schedules remain unaffected. Employers should have a clear understanding with their insurance companies concerned.

28. A member of the Auxiliary Police must be physically fit to perform his duties properly and in an efficient manner. It is sufficient if his physical fitness satisfies the plant guard officer.

29. Each member of the Auxiliary Military Police will be properly uniformed by the plant. A complete uniform consisting of blouse, or shirt, trousers and hat is not required, although the complete uniform is preferred. Obviously the uniform adopted by the plant must be worn by all members of the plant guard force.

30. Because the mission of the Auxiliary Military Police

includes service in the Army, the laws of war require that the members wear distinctive insignia or marks capable of recognition at a distance. By wearing such insignia or marks, members, serving with the Army, will be recognized as legitimate troops and not deemed irregulars or guerillas. Accordingly, members of the Auxiliary Military Police in the Fifth Service Command will wear the insignia as outlined in Plant Protection Data Binder Letter Section V—letter 3.

31. Each member of the Auxiliary Military Police is authorized to wear a service stripe for each six months of service faithfully performed. Service stripes will be in accordance with Army Regulations. A Plant Protection Data Binder letter will be issued shortly completely describing service stripes.

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32. Members of the Auxiliary Military Police, who are entitled thereto in their own right may wear, when in their plant guard uniform such decorations, service medals, ribbons and badges as are authorized for wear on the United States Army service uniform.

33. For plants that have established proper plant protection proficiency and where the guard force is of adequate size, properly drilled, properly uniformed and meeting certain minimum requirements, a distinctive guidon for the Auxiliary Military Police Force at that plant will be authorized.

34. Each member of the Auxiliary Military Police must carry at all times a proper identification card completed and issued by this office. This identification card is described in Plant Protection Data Binder Letter Section V—6.

35. The Auxiliary Military Police must be armed with appropriate weapons furnished by the plant management. Training in the use of firearms and providing the ammunition, therefore, are functions of plant managements. Instruction in the use of firearms is being given by the plant guard officers as a part of the plant guard training program now being conducted.

36. The Auxiliary Military Police are agents of the Federal Government and will not be subject to any state or municipal requirement which conflicts with their war time duties. Plant Guards should not be permitted to wear or carry firearms away from the plant property, excepting when the fulfillment of their duties requires it. Also, an exception is the wearing of side arms by the plant guards to plant guard training schools or to pistol ranges where they are practicing firing revolvers.

37. In general, there will be no considerable additional advantage in deputizing the members of the Auxiliary Military Police as special policemen, sheriffs, or marshals. There will be individual cases, however, in which it will be advisable to continue the local or state official capacity. The authority of the plant guard includes power to arrest without a warrant for violation of the Sabotage Act (50, USC, 101-106) or the Espionage Act (50, USC, 21-32). The plant management continues to be charged with the training of its guard forces in their ordinary protective duties. In addition, the guard force must be qualified to perform its duties as set forth in paragraph 6. This includes the ability

to serve efficiently with the Army in any emergency situation which may arise (see paragraph 7). To this end, the Auxiliary Military Police will be trained by, or under the direction of the plant guard officer in military subjects in accordance with requirements established by the District Plant Guard Officer. The time to be devoted to such training will be determined by the plant guard officer. It will not exceed one hour per week or its equivalent except with the approval of the plant management.

38. When a member of the Auxiliary Military Police injures or kills a person while in the performance of his duties, he will be arrested and detained by the Plant Guard Officer. If a civil police official seeks to arrest him, the plant guard officer, under the authority of the 74th Article of War, may refuse to release the individual until such release is approved by the Commanding General of the Service Command. A member of the Auxiliary Military Police

is entitled to the same protection as a sentinel under similar circumstances.

39. Members of the Auxiliary Military Police are eligible for the decoration "Medal of Merit" authorized by the President for award to civilians who distinguish themselves by especially meritorious conduct or by performance of outstanding services. All cases of members of the Auxiliary Military Police, who in the opinion of the District Plant Guard Officer deserve consideration for this award will be referred through channels to the Office of the Provost Marshal General for transmission to the "Medal of Merit" Board. A full statement of facts and appropriate recommendations should be included.

40. Any case of meritorious conduct, which in the opinion of the District Plant Guard Officer does not warrant recommendation for the award of the "Medal of Merit", but which he deems deserving of official commendation will be the subject of a special order of commendation issued by the Commanding Officer having jurisdiction over the guard force. Such special orders will be issued promptly and with liberality and will be given appropriate publicity, particularly among the guard force concerned. A copy of such special order will be furnished to the employer.

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41. Any questions concerning information given in the foregoing should be addressed directly to this office.

Yours very truly,

A. C. Rasmussen,
Lt. Col., Ord. Dept., District Chief.

Incls: 2
CIPP 124—Guard Agreement
CIPP 68—Guard Order #1

CIPP 139-9

RESPONDENT'S EXHIBIT NO. 5.

We Are Permitted to Employ Only Citizens of the United States

Application for Employment
E. C. Atkins and Company
Indianapolis, Indiana

Please Print Draft Classification.....

Date ..... Social Security No. .....

Name (Last Name)..... (First Name).....
(Middle Name)..... Sex..... Race.....

Address (Number and Street)..... (City)
..... (State).....

Phone.....

Age..... Height: Ft..... In..... Weight..... No. of Children..... Ages..... No. of Other Dependents .....

Relatives in Company: (Yes or No.)..... Names and Relationship .....

Are You a Former Employee? (Yes or No)..... Date Last Employed by This Company..... Why Did You Leave? .....

Check One: Married Single Widow(er) Divorced Separated

Citizen of the United States (Yes or No)..... Place of Birth ..... Date of Birth.....

If Foreign Born, State: (Port of Entry).....
Date of Entry..... Date First Papers.....
Date Last Papers.....

Place of Issuance Naturalization.....
How Long in U. S.? (Years)..... How Long in City? (Years).....

Father's Name..... Place of Birth.....
Citizen of U. S. (Yes or No).....

Mother's Maiden Name..... Place of Birth
..... Citizen of U. S. (Yes or No.).....

United States Military Service (Yes or No).....
Branch..... How Discharged..... Date
.....

Are You Now a Member of any Military or Naval Unit?
(Yes or No)..... Have You Been to a Foreign
Country in the Past 15 Years? (Yes or No).....

Education and Special Training:

Grade School (Years)..... High School (Years)
..... College (Years)..... Technical,
Trade or Business (Years).....

High School (Name and Location).....
Course of Study.....

College (Name and Location)..... Subject
Majored in .....

Do You Write or Speak Any Foreign Language?.....
If So Which Language.....

What Is Your Hobby?..... Do You Read
Blue Prints?..... How Well?.....

(For Married Applicants Only)

Husband's Name or / Wife's Maiden Name } (Strike Out One—If Married)
..... Birthplace (Husband or Wife)
.....

Husband's / or Wife's } Occupation (Strike Out One—If Married)
..... In An Emergency Notify
.....

Mark Number of Months Worked on any of the Following:

Office

__ Addressograph Machine
__ Bookkeeping, General Ledger
__ Bookkeeping, Machine
__ Clerk, Accounts Payable
__ Clerk, General File
__ Clerk, Mail
__ Clerk, Statistical
__ Comptometer
__ Purchasing
__ Secretarial
__ Tabulating Machine
__ Timekeeper
__ Typist Stenographer
__ Cost Accounting

Experience Not Listed Above

____ _____
____ _____
____ _____
____ _____
____ _____
____ _____
____ _____
____ _____
____ _____
____ _____
____ _____

____ Welding, Arc Steel
____ Welding, Aluminum
____ Sheet Metal, Bench
____ Brake, Metal
____ Bending and Rolling Machine
____ Shear, Foot
____ Cable Splicing
____ Exp. Assembly
____ Instrument Installation

Maintenance

____ Blacksmith
____ Carpenter
____ Electrician
____ Janitor
____ Laborer
____ Millwright
____ Pipefitter
____ Welding

Engineering Experience

____ _____
____ _____
____ _____
____ _____

Drafting

____ Layout
____ Detailing
____ Checker

..... Tool Design
..... Tool Routing
..... Blue Print Machine

Machine Shop

..... Milling Machine
..... Mill, Horizontal Boring
..... Mill, Thread
..... Profiler
..... Broach
..... Lathe, Engine
..... Lathe, Bench
..... Lathe, Automatic
..... Lathe, Turret
..... Jig Borer
..... Drill Press
..... Drill Press, Multiple Spindle
..... Radial Drill
..... Casting Layout
..... Screw Machine, Hand
..... Screw Machine, Automatic
..... Gear Shaper
..... Gear Cutter
..... Grinder, Internal
..... Grinder, Cylinder Internal
..... Grinder, External
..... Grinder, Gear
..... Grinder, Surface
..... Grinder, Centerless
..... Grinder, Tool
..... Grinder, Drill
..... Grinder, Cutter
..... Buffing and Polishing
..... Machinist, Bench
..... Machinist, All Around
..... Die Making
..... Jig Building
..... Tool Making
..... Template Making
..... Punch Press

Miscellaneous

..... Electro Plating
..... Heat Treating
..... Inspection, Receiving
..... Inspection, Floor
..... Inspection, Final
..... Inspection, Assembly
..... Inspection, Tool and Gauge
..... Pattern Making, Wood
..... Pattern Making, Metal
..... Sand Blasting
..... Shipping and Receiving
..... Bearing Casting

Executive Experience

State Nature

....
....
....

Have You a Complete Set of Tools? Yes..... No.....
If Not, What Tools Have You?.....

List All Past Employment, etc.: Last Employment in Space No. 1. Include Periods of Unemployment.

Name of Past Employers and Addresses	Dates of Employment From Mo. Yr.	To Mo. Yr.	Job Classification or Duties	Salary or Wages	Reason for Leaving
(1)					
(2)					
(3)					
(4)					
(5)					
(6)					

List Three References Not Relatives or Employees of This Company

Name..... Address.....
Occupation.....

Name..... Address.....
Occupation.....

Name..... Address.....
Occupation.....

For What Kind of Work Are You Applying?.....
Second Choice.....

Have You Any Physical Disability? (Yes or No).....
If So, State Condition.....

1 BEFORE THE NATIONAL LABOR RELATIONS BOARD.

Ninth Region.

In the Matter of: E. C. Atkins and Company and International Association of Machinists, District 90, and Their Affiliate Local 1683, Affiliated With the American Federation of Labor.	Case No. 9-C-1982.

Room Number 216
Federal Building
Indianapolis, Indiana
Monday, January 31, 1944

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock a. m., c. w. t.

Before:

Charles E. Persons, Trial Examiner.

Appearances:

Messrs. Thomas E. Shroyer, and
Allen Sinsheimer, Jr., for the National Labor Relations Board, 443 U. S. P. O. and Court House, Cincinnati, Ohio.

Messrs. Kurt F. Pantzer, and
Lewis D. Spencer, 1313 Merchants Bank Building, Indianapolis, Indiana,
Appearing on behalf of the Respondent.

Messrs. F. M. Richardson, Business Agent,
Carl Cedarquist, Grand Lodge Representative,
William J. Layton, Business Agent, 49½
2 South Delaware Street, Indianapolis, Indiana; and

Mr. Van B. Carter, Business Agent, International Association of Machinists, Broadway Hotel, Cincinnati, Ohio,
All appearing on behalf of the International Association of Machinists, District Number 90, and their affiliate Local Lodge 1683.

15 It is hereby stipulated and agreed as follows:

That the entire record in the matter of E. C. Atkins and Company, and International Association of Machinists, District 90, and their affiliate Local 1693, Case number 9-R-1200, be incorporated herein by reference and considered as if a part hereof specifically involving thereby, but not in any way limiting generally in the foregoing:

(1) All exhibits therein:

(2) The entire official report of the proceedings of the hearing of that case on September 24, 1943:

(3) Brief of E. C. Atkins and Company filed therein:

(4) Decision and Direction of Election of the National Labor Relations Board in said matter dated October 19, 1943:

(5) Petition of E. C. Atkins and Company dated October 28, 1943 asking reconsideration of the said Decision and Direction of Election of October 19, 1943:

(6) Order Denying Petition dated November 2, 1943:

16 (7) Report of Acting Regional Director on Order of Election, dated November 18, 1943:

(8) Affidavit as to Service thereof:

(9) Certification of Representatives dated November 29, 1943:

Now, is that statement agreed to, Mr. Pantzer?

Mr. Pantzer: Yes, I so stipulate.

Mr. Sinsheimer: Does the Union stipulate to that statement?

Mr. Richardson: Yes, we so stipulate.

* * * * *

18 Mr. Sinsheimer: Mr. Pantzer has just handed me a statement concerning commerce which I am accepting and reading into the record. That statement reads: (Reading)

E. C. Atkins data as to commerce:

19 It is dated January 31, 1944:

(Reading from document) E. C. Atkins and Company parenthesis herein referred to as the, quote, "Employer" end parenthesis, is a corporation organized and existing under the laws of the State of Indiana with two

plants in Indianapolis, Indiana. The main plant in Indianapolis, which occupies two entire city blocks and is bounded on the north by South Street, on the west by Capitol Avenue, on the east by Illinois Street, and on the south by Merrill Street, has been in operation since 1857. The Federal Government owns the new armor plate plant employed by the Employer in war production at the southeast corner of 21st Street and Northwestern Avenue.

The Employer is engaged in the business of manufacturing and selling saws, tools and armor plate, parenthesis, (hereinafter referred to as the "Business of the Employer") end quote, and parenthesis.

The facts bearing upon the question of whether the Employer is engaged in interstate commerce, and whether a question of representation affecting commerce arises, in this cause, are as follows:

1. The principal raw materials used in the Business of the Employer are steel, castings, and lumber, parenthesis, (hereinafter referred to as the "Raw Materials") end quote, end parenthesis.

2. Approximately eighty per cent of the raw materials used in the Business of the Employer is purchased and shipped in interstate commerce from sources outside the State of Indiana.

3. Approximately eighty per cent of the finished products produced by the Employer is sold in interstate commerce to purchasers outside the State of Indiana.

4. During the calendar year 1943, the Raw Materials used in manufacturing the finished product of the Employer cost in excess of five hundred thousand dollars.

5. During the calendar year 1943, the gross sales price of the finished product sold by the Employer was in excess of one million dollars.

6. The Employer ships its finished products by rail and truck.

7. The finished product of the Employer is disposed of to the United States Government, jobbers, dealers, subcontractors, and direct to manufacturing consumers.

8. The Employer advertises through industrial magazines and periodicals.

9. During the calendar year 1944, to the date of this hearing, the manufacturing and selling operations of the Employer have continued substantially along the same lines as those related, concerning the year 1943, in the preceding sections hereof.

21 E. C. Atkins and Company.

Trial Examiner Persons: Is this stipulated by all the parties that that statement is correct in all detail?

Mr. Pantzer: We so stipulate, sir.

Mr. Sinsheimer: The Board so stipulates.

Mr. Richardson: We so stipulate.

• • • • •

22 Mr. Richardson: Yes.

Trial Examiner Persons: And the Board so stipulates?

Mr. Sinsheimer: Yes, the Board so stipulates.

Mr. Pantzer: With the Board's permission and the Examiner's, I should like to interpolate a further stipulation, namely, that the parties hereto agree that all the other witnesses who testified at the hearing of September 24, 1943, would, if they took the stand in this hearing today, testify exactly as they did on September 24, 1943, with the exception of the natural allowances in their testimony which would have to be made as to time, because of the intervening period from September 24, 1943 to January 31, 1944.

Mr. Sinsheimer: The Board agrees to that.

Mr. Richardson: Yes, we agree to that also.

Mr. Pantzer: We so stipulate also.

Now, that stipulation includes not merely the witnesses of the Respondents, but all of the other witnesses of the Board, is that right? There were other witnesses for the Board, I think.

• • • • •

34 Mr. Sinsheimer: At this time I would like to call to
35 the Trial Examiner's attention that in Paragraph 7 of Respondent's Answer, the Respondent insists that the Union has requested bargaining rights, and in Paragraph 8 the Respondent admits that the Company has refused to bargain with the Union. I believe Mr. Pantzer desires to make a statement as to that—

Mr. Pantzer: I merely desire to call the Trial Examiner's attention to the two qualifications I set forth in the Answer to those two admissions which are dependent, of course, upon the definition of the word "employees".

Trial Examiner Persons: I think it might be helpful to the record if you would tell us how the Company received that proposed agreement, whether there were any definite demands or requests for changes in the document itself?

Mr. Pantzer: I cannot state how the Respondent received the proposed agreement prior to December 20, from my own knowledge, but I state, subject to correction by Mr. Richardson over at the Union's table there, that it was received in an envelope through the United States mail, addressed to E. C. Atkins and Company, Indianapolis, Indiana, without any forwarding letter.

Mr. Richardson: That's right.

Trial Examiner Persons: Will the Respondent agree that that was, in effect, a request for collective bargaining?

Mr. Pantzer: Yes. I do not wish to quibble with
36 the Trial Examiner. Quibbling is possible, but I should say that even if the Company has not had much experience with such requests, the attorney for the Company has had and the attorney for the Company should have advised the Company that it was such a request.

Trial Examiner Persons: Thank you, sir.

Mr. Sinsheimer: The Board rests.

Trial Examiner Persons: Do you have matters to present, Mr. Pantzer?

Mr. Pantzer: I have no testimony or exhibits to submit in answer to the Board's case, but wish to be permitted this statement:

That the Respondent will, if it is finally determined that the Respondent's contention as to the definition of the word "employees" is incorrect, gladly bargain with the Union in this case and that the Respondent, as an employer, has no animosity whatever toward Mr. Richardson, who has been the organizer of the Union and who has behaved himself and counseled members of the Union to behave themselves, with exemplary conduct in this case.

• • • • •

37 Trial Examiner Persons: There is one little matter that I read in the Answer, Mr. Pantzer, upon which I would be glad to have your definition, in Paragraph 5 on page 2, wherein you speak about the Board's election and wherein you state ". . . but the Respondent denies that such secret ballot election was properly conducted—" and etcetera, and my question is about your phrase "denies—such—election was properly conducted—" and my question is: What connotation is intended by that, sir?

Mr. Pantzer: There is no connotation intended by that language that the election was conducted other than in a very fair and accurate way and that the ballots were cast as shown by the certificate; that the ballots were counted and that the results were as shown.

In other words, on the matter of the fairness of the election, there is no contention.

The only contest is that it was not a proper election in the light of the fact that the plant guards who voted in that election were not employees of the Respondent within the meaning of the word "employees" as defined in the National Labor Relations Act and that consequently the election was improper in that the Board had absolutely no jurisdiction in the premises.

Trial Examiner Persons: But there is no contest as to the conduct of the election itself?

38 Mr. Pantzer: None whatever.

BOARD EXHIBIT NO. 102.

An Agreement Between the
E. C. Atkins Company
Indianapolis, Indiana
and the
International Association of Machinists, District No. 90 and Its Affiliated Local Lodge No. 1683.

Preamble

E. C. Atkins Company and the International Association of Machinists, District No. 90, and its affiliated Local Lodge No. 1683, desiring to promote and improve relationship be-

tween the parties, and to establish basic understanding as to hours of work, conditions of employment, rates of pay and to provide a fair and equitable method of handling and adjusting grievances, have negotiated and do hereby agree to the following Articles of Agreement at Indianapolis, Indiana, on this ..... day of ....., 1943.

Article I—Recognition.

Section 1. Recognition. E. C. Atkins Company, hereinafter called the Company does hereby recognize the International Association of Machinists, District No. 90, and its affiliated Plant Protection Local Lodge No. 1683, hereinafter called the Union, as the exclusive bargaining agent within the meaning of the National Labor Relations Act, for its employees in the unit described in Section 2 of this Article.

Section 2. Unit. The National Labor Relations Board has certified and the Company and the Union do hereby agree that the Unit appropriate for collective bargaining purposes, hereinafter called the Union shall consist of "all guards of E. C. Atkins Company, excluding Captain, Director and Assistant Director, and all other employees."

Section 3. Union Shop. The employees of the Company within the Unit described in Section 2 of this Article shall become members of the Union Within thirty (30) days after the effective date of this Agreement, and as a condition of employment shall remain members in good standing in the Union during the life of this Agreement. New employees and employees now serving their probationary period shall become members of the Union at the expiration of their probationary period and shall remain members in good standing in the Union as a condition of employment during the life of this Agreement.

Article II—Representation.

Section 1. Shift Committeemen. The Union shall appoint or elect not more than one (1) Shift Committeeman for each shift or crew. It shall be the duty of the Shift Committeeman to take up with the proper Company officer

grievances or suggestions from employees on his shift or crew.

Section 2. Negotiating and Grievance Committee. The Negotiating and Grievance Committee shall consist of four (4) members and shall handle grievances or suggestions referred to them by the Shift Committeeman, which are not satisfactorily adjusted by the Shift Committeeman. Representatives of District No. 90 and the International Union may be present at any, or all, of the meetings for the purpose of collective bargaining, or the handling of grievance matters.

Section 3. Change in Union Officers. The personnel of the Shift Committee and the Negotiating and Grievance Committee shall be certified to the Company and the Union shall promptly advise the Company of any changes in such personnel as they occur.

Section 4. Regular Meetings. Company representatives and the Negotiating and Grievance Committee shall meet monthly for the purpose of considering any grievances, suggestions, or other matters ordinarily considered at such joint meetings. In case an emergency arises, meetings may be held more often by mutual agreement.

Article III—Grievance Procedure.

Section 1. Steps in Procedure. It is agreed that grievance procedure shall be as follows:

A. Whenever an employee in the Unit believes that the Company is violating any part of this Agreement, or that he is being unjustly or unfairly dealt with by any officer or agent of the Company, he may go to either the Sergeant on his shift, or Shift Committeeman and state his grievance or suggestion. The Sergeant, the employee, and the Shift Committeeman shall make every honest effort to adjust all grievances or complaints.

B. If, under Section A, adjusting of the employee's grievance is not reached within three (3) days, the matter shall be referred to the Negotiating and Grievance Committee by the employee or the Shift Committeeman. The Sergeant shall refer the matter to the Captain, or the Director of the Plant Protection Force.

C. If the Negotiating and Grievance Committee is unable to reach a satisfactory adjustment with the Captain, or the Director of the Plant Protection Force, the Committee shall then appeal the matter to the Executive Officers of the Company. In this final step the Company and the Union, either separately or jointly, may invoke the aid of the Conciliation Service of the United States Department of Labor, or any other United States Government or a State Government Agency that may have jurisdiction over the matters in dispute.

D. An aggrieved employee shall be subject to call by the Company or the Union to appear in any or all of the foregoing conferences for the purpose of giving testimony having a bearing on the case. Likewise, equal rights shall be given the aggrieved employee to be present at such conferences on his own initiative, providing such desire is presented in writing to the Negotiating and Grievance Committee within five (5) days from the initial date of filing the grievance.

Section 2. Records. All grievances shall be in writing and in duplicate. When a grievance has been settled or adjusted one copy will be filed by the Company and one by the Union as a matter of permanent record; providing, however, that if a grievance is adjusted between the Shift Committeeman and the Sergeant, no written record is required. All cases handled by the Negotiating and Grievance Committee shall be in writing, and the Company shall give written decisions on each separate case, a copy of such written decision to be sent to the Office of District No. 90.

Section 3. Appeal. Any alleged grievance not appealed from a decision at one step of the procedure to the next step within five (5) days of the Company's written decision shall be conclusively presumed to be settled on the basis of the last decision which decision shall be binding and not subject to further appeal.

Article IV—Discharge.

Section 1. Discipline. The Company shall have the right to discharge, suspend, or discipline any employees for cause or violation of any of the Company's posted

rulings or regulations. Any employee discharged, suspended, or otherwise disciplined who feels that he has been unjustly dealt with by the Company's representatives or agents shall have recourse through the grievance procedure provided in Article III of this agreement. If an employee, after investigation, is found to have been unjustly discharged, or suspended, he shall be reinstated without loss of seniority and paid for time lost less any wages received from other employment during such period of lost time.

If a discharged, or suspended employee fails to present his discharge or suspension as a grievance by the end of the second full working day after his discharge or suspension, such discharge or suspension shall be considered as final and no grievance based thereon shall be considered.

Article V—General Working Conditions.

Section 1. Work Stoppage. The Union agrees that there shall be no strikes, stoppages, or boycotts during the life of this agreement.

Section 2. Lockout. The Company agrees that there shall be no lockout or discrimination during the life of this agreement.

Section 3. Uniforms and Equipment. The Company agrees to furnish all uniforms and equipment to the employees coming under the provisions of this Agreement, and further agrees to replace any badly worn uniforms, over-coats, rain-coats, and hats, and any other equipment necessary to carry out the duties assigned to them, provided the employee does not abuse this equipment by improper care, or by wearing same off duty.

Section 4. Personal Appearance. Guards reporting for duty shall be neat in appearance, clean shaven, and in the uniform furnished for the season. Any guard violating this Section shall be subject to one day's suspension.

Section 6. Bulletin Boards. The Company shall provide a reasonable number of bulletin boards on which the Union may post notices of its recreational and social affairs and of Union elections and results thereof, appointments, and meetings. All such notices must be approved by the Com-

pany before being posted, and shall be countersigned by the officer of the Union. The Union shall promptly advise the Company of the officers who have the power to countersign such notices and shall provide it with their specimen signatures. There shall be no other distribution or posting by the Union or employees on the Company's property of pamphlets, advertising of political matter, notices, or any kind of literature other than herein provided.

Section 7. No Age Limit. So long as an employee is capable of performing his work, age shall not be a disqualifying factor either in hiring of new help or the continued employment of employees; provided, however, that the Company shall not be compelled to retain in its service any employee who is not qualified to perform his duties.

Section 8. Safety Committee. The Union shall be represented by at least one member on the Safety Committee.

Article VI—Seniority.

Section 1. Definition. Rights to promotion, preferences to shifts, and the right to remain in the service of the Company in case of reduction in force shall be governed by seniority subject to the provisions of this Agreement.

Section 2. Seniority Date. An employee's seniority shall begin on the date he enters the employ of the Company in the Unit, but he shall not be placed on the Seniority List and shall not enjoy the rights enumerated in Section 1 of this Article until he completes the probationary period as provided for in Section 3 of this Article.

Section 3. Probationary Period. All new employees shall be considered as on probation for a period of sixty (60) working days after their date of hiring, and there shall be no responsibility on the part of the Company for re-employment of probationary employees if they are laid off or discharged during this period.

Section 4. Layoffs. In the event of the reduction in force, the last employee hired shall be the first to be laid off. When necessary to increase the force after a layoff, the

last employee laid off shall be the first to be returned to service.

Section 5. Recall to Work. When it becomes necessary to lay off employees as much notice as possible will be given, but in any event such notice of layoff shall be not less than twenty four (24) hours. When calling employees to return to work after a layoff, the Company will ordinarily use Registered Mail, but in an emergency, the Company may notify some, or all, employees by phone, or in person, to return to work. Any employee who fails to return to work or get in touch with the Company within five (5) business days after the day his notice is mailed will be conclusively presumed to have resigned and his record shall be noted accordingly.

Section 6. Change of Address. Laid off employees shall keep the Company and the Union advised of any change of address. The Company is entitled to rely on the address furnished by the employees for all purposes within the meaning of this Agreement.

Article VII—Management of Plant.

The management of the Plant and the direction of the working forces, including the right to hire, suspend, or discharge, for proper cause, or transfer, and the right to relieve employees from duty because of lack of work or for other legitimate reasons is vested exclusively in the Company; provided, that this will not be used for purposes of discrimination against any member of the Union.

Article VIII—War Department Regulations.

It is understood that for the duration of the war this Agreement is in all respects subject to the provisions of the Directives of the War Department concerning Military Organizations of the Plant Guard Forces (WD Directive, July 2, 1942, Ag 231.43; SOS Circular ....., 1942; and any amendments thereto), and that nothing contained in this Agree-

ment shall be construed in any way to interfere with the organization, efficiency, training, and control by the War Department of the Company Guard Force as an Auxiliary to the Military Police, nor to abrogate or interfere with the duties, responsibilities, and rights imposed by the War Department upon any employee in such Auxiliary Military Police.

Article IX—Leave of Absence.

Section 1. Requested Leave. Leave of absence may be granted to an employee for reasons such as: Jury duty, attending convention, or voluntary military duty in defense of the United States and for other valid reasons. Request for leaves of absence must be made to the Director of Plant Protection in writing and each case will be decided on its merits. The employee shall not lose his seniority during such leaves of absence. An employee laying off from work without notice, or just cause may be subject to loss of seniority.

Section 2. Military Leave. Any employee called to compulsory military duty shall retain his seniority and the Company shall reinstate such employee within forty (40) days after his return, provided, however, that he pass the physical examination as given on entering the service of the Company, and if a layoff period is in effect which would have included such employee had he been working, it shall be effective as to him.

Section 3. Failure to Return. Employees not returning upon the expiration of their leave shall be considered to have quit voluntarily.

Section 4. Records. The Bargaining Committee shall be supplied monthly with copies of the names of all employees on leave of absence for more than a week.

Article X—Duration.

Section 1. Time of Expiration. This Agreement shall remain in force for one (1) year from the date hereof, and shall automatically renew itself from year to year unless

written notice of desire to terminate or to modify any portion or any of the terms hereof is given, by either party to the other at least thirty (30) days prior to the expiration of any such annual period.

Amendments may be made from time to time by mutual agreement.

Section 2. Effective Date. This Agreement shall be effective at once, except that part which is subject to War Labor Board approval. The Company and the Union will jointly apply to the War Labor Board for their approval from the date of signing.

Section 3. Supplements. There is attached hereto and made a part hereof Supplement No. 1, governing hours of work, and Supplement No. 2, governing wage rates. Because of present economic conditions it is agreed that Supplements Nos. 1 and 2 may be revised or amended by agreement between the Company and the Union on three (3) days' notice from either party and without disturbing any of the other Articles of this Agreement.

Article XI—Vacations.

Section 1. Eligibility. Employees who have one (1) year or more of continuous service in the Unit shall be entitled to a vacation of one (1) week.

Section 2. Vacation Pay. Employees entitled to a vacation under Section 1, of this Article, shall be paid forty (40) hours at the hourly rate received the last pay period in June of each year. Vacation pay checks shall be delivered to the employee before his vacation starts.

Section 3. Vacation Period. All vacations shall be taken between July 15, and September 30, of each year, and must be arranged for in advance with the Director of Plant Protection.

Section 4. Foregoing Vacations. Any employee who is entitled to a vacation and, on request of the Company, does not take it, shall be paid his vacation pay in addition to earnings on the job.

In witness whereof, the parties hereto have executed this agreement as of this date, ... 194...

For the Employees International Association of Machinists, District #90, Local Lodge #1683	For E. C. Atkins Company
.....	.....
	President.
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....
Negotiating Committee.	

Supplement No. 1.

Hours.

Section 1. The work week shall consist of seven consecutive days beginning on Monday of each week. The work day shall be the calendar day from midnight to midnight. Each employee shall have a designated time at which work day commences.

Section 2. The first forty (40) hours of work in any work week, not exceeding eight (8) hours in any one day, shall be paid for at the regular rate. Work in excess of forty (40) hours in any work week, or in excess of eight (8) hours in any one day, shall be paid for at one and one half times the regular rate.

Section 3. Subject to the provisions of Executive Order #9240 and of Section 2, of this Supplement, when an employee works six (6) consecutive days in a work week, time and one half shall be allowed for time worked in the sixth (6th) consecutive work day in any work week; also time and one half shall be allowed for time worked on New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day.

Section 4. Subject to the provisions of Executive Order #9240, when an employee works seven (7) consecutive days, double time shall be allowed for all work done on the seventh (7th) consecutive work day in any work week.

Section 5. Each shift worked will be counted as of the work day in which the shift began. For example, a shift works from 11:00 P. M., Monday until 7:00 A. M. Tuesday, would be counted as of Monday.

Section 6. When a holiday is not observed, that is, when shifts operate as usual on a holiday, time and one half will be paid only for the shift that begins on the holiday.

Section 7. No employee shall be laid off during the regular work day or work week without pay for the purpose of avoiding overtime payment.

Section 8. The Company reserves the right to change shift hours within the limitations of Executive Order #9240, however, before any change is made in shift hours, either in the number of hours worked per week, or the starting time of shifts, the Bargaining Committees shall be advised in advance and given an opportunity to present objections which will be given consideration before any such change shall become effective.

Supplement No. 2.

Wages.

Wages for all employees alike coming under the provisions of this agreement shall be as follows:

Hiring rate	.75 per hour
After 30 days	.80 per hour
After 90 days	.90 per hour
After 6 months	1.00 per hour

None of the provisions of Supplement No. 2 shall be effective until approved by the National War Labor Board and when so approved they shall become effective as of the beginning of the work week which commenced on ...., 194....., unless some other effective date is prescribed by the National War Labor Board.

BOARD'S EXHIBIT NO. 103.

(Copy)

E. C. ATKINS AND COMPANY
402 South Illinois St.
Indianapolis 9, Ind., U. S. A.
December 20, 1943

International Association of Machinists
District #90, Local 1683
49½ South Delaware Street
Indianapolis, Indiana

Attention: Mr. F. M. Richardson
Business Representative

Dear Sir:

This will acknowledge receipt of the proposed form of contract to be entered into between the International Association of Machinists, District #90, and its affiliated local lodge #1683, and the E. C. Atkins and Company.

You have doubtless been advised of the position heretofore taken by our Company that the auxiliary military police which you represent are in no sense employees of our Company and that consequently we have no obligation under federal or state law to bargain with you as their representative.

Under the circumstances may we suggest that you take such other action as you see fit to establish our obligation to bargain with you respecting such auxiliary military police.

Yours truly,
E. C. Atkins and Company,
/s/ Cyrus E. Wood,
Cyrus E. Wood,
Personnel Director.

CEW:as

BOARD'S EXHIBIT NO. 104.

(Copy)

BARNES, HICKAM, PANTZER & BOYD
Attorneys at Law
Indianapolis 4, Indiana
December 22, 1943.

E. C. Atkins and Company
Case No. 9-R-1200
Mr. John Getreu
National Labor Relations Board
Architects Building
Indianapolis, Indiana

Dear Mr. Getreu:

This will follow up our telephone conversation of today, in which you advised that International Association of Machinists, District 90 and their Affiliate, Local 1683, filed a charge of unfair labor practice against my client, E. C. Atkins and Company, for refusal to bargain, and asked me to state the position of my client.

I think the position is well stated in the letter which E. C. Atkins and Company wrote the Union when it was requested to bargain, which letter you said you had already read.

The reasons supporting the position stated in the letter are best set forth in the two briefs which our firm prepared and filed in behalf of E. C. Atkins and Company with the National Labor Relations Board. I enclose copies of each. You will note we asked for oral argument, which we were never accorded. Furthermore, the Board in its Decision completely disregarded the absolutely undisputed evidence by failing to find any of the facts favorable to our contentions. In addition, the Board depended chiefly upon cases relating to facts which antedated the military orders, which constituted the main basis of our case. Under the circumstances, we feel we are entitled to a review of the entire situation by a court that will at least grant us a hearing upon the facts.

You understand, of course, that in the position taken by

E. C. Atkins and Company, there is no personal animosity toward you or the Regional Office at Cincinnati, and that the feelings of the executives of E. C. Atkins and Company and myself are, of course, most friendly toward Mr. Richardson, the Union organizer.

I am with kind regards,

Sincerely yours,

/s/ Kurt Pantzer.

KFP/TB
Encls.

SUPPLEMENTAL APPENDIX TO PETITIONER'S BRIEF.

In the

United States Circuit Court of Appeals
For the Seventh Circuit

No. 8669

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

E. C. ATKINS AND COMPANY,
Respondent.

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

U. S. C. C. A. - 7
FILED
OCT 3 - 1944
KENNETH J. CARRICK
CLERK

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UNITED STATES OF AMERICA.

NATIONAL LABOR RELATIONS BOARD

Washington, D. C.

In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90, and Their Affiliate Local 1683, affiliated with the American Federation of Labor.	Case No. 9-C-1982.

STATEMENT OF EXCEPTIONS TO INTERMEDIATE REPORT, RECORD, AND PROCEEDINGS.

The Respondent, E. C. Atkins and Company, herewith files its statement in writing setting forth its Exceptions to the Intermediate Report and to other parts of the record and proceedings in this cause (including rulings upon all motions or objections), and in support thereof alleges:

I.

Definitions.

National Labor Relations Board is hereinafter referred to as the "Board."

E. C. Atkins and Company, the Respondent herein, is hereinafter referred to as the "Respondent."

International Association of Machinists, District 90, and their affiliate Local 1683, affiliated with the American Federation of Labor, the Complainant herein, is hereinafter referred to as the "Union."

Case No. 9-R-1200, entitled "In the Matter of E. C. Atkins and Company and International Association of Machinists,

District 90 and their affiliate, Local 1683, Petitioner," Notice of Hearing in which was dated September 16, 1943, and hearing in which was held September 24, 1943, is hereinafter referred to as the "Representation Case."

The Decision and Direction of Election, dated October 19, 1943, in the Representation Case, is hereinafter referred to as the "Decision in the Representation Case."

The "Certification of Representatives," dated November 29, 1943, in the Representation Case, is hereinafter referred to as the "Certification of Representatives."

Case No. 9-C-1982, entitled "In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90, and their Affiliate Local 1683, Affiliated with the American Federation of Labor," Notice of Hearing in which was dated January 12, 1944, and hearing in which was held January 31, 1944, is hereinafter referred to as the "Unfair Labor Practice Case."

The "Intermediate Report," dated February 19, 1944, in the Unfair Labor Practice Case, is hereinafter referred to as "Intermediate Report in the Unfair Labor Practice Case."

II.

Exceptions to Findings of Fact.

The Respondent excepts to the Findings of Fact for the reasons stated:

A—Exceptions to Decision in Representation Case.

Exception No. 1. There is no finding in Finding of Fact II, entitled "The organization involved" that either (a) the "employees" of the Respondent referred to are the Plant Guards which were the subject matter of the representation proceedings, or (b) the "employees" admitted to membership in the Union were "employees" of the Respondent within the meaning of Section 2, clause 3, of the National Labor Relations Act.

Exception No. 2. There is no finding in the entire Find-

ings of Fact that the Plant Guards stationed at the two Indianapolis Plants of the Respondent were "employees" within the meaning of any provision of the National Labor Relations Act.

Exception No. 3. There is no finding in the Findings of Fact that the Respondent was an "employer" of the Plant Guards stationed at the two Indianapolis Plants of the Respondent within the meaning of Section 2, clause 2, of the National Labor Relations Act.

Exception No. 4. There is no finding which sets forth as existing between the Respondent and the Plant Guards stationed at the two Indianapolis Plants of the Respondent any of the incidents of "employer" and "employee," as such incidents existed at common law, other than the inferential finding that "in the Dravo corporation case, the Board fully discussed the question as to whether the militarization of guards alters the character of their employment, stating therein that the relationship of employer and employee still exists despite such militarization"; and such incorporation by reference of facts which may or not have existed in the Dravo Corporation case does not constitute a finding of fact with respect to the instant case within the meaning of Section 9 or Section 10 of the National Labor Relations Act so as to form the basis for a valid decision or order, as the case may be, in a representation case or an unfair labor practice case before this Board.

Exception No. 5. The finding that the facts in the instant case inferentially resembled the facts in the Dravo Corporation case is not a finding of fact upon the record in this case so as to make any decision or order rendered upon such inference or conclusion a binding order within the meaning of due process, as used in the Fifth Amendment to the Constitution of the United States; and consequently the Findings of Fact, Conclusions of Law, and Decisions, Directions and Orders heretofore rendered by the Board in this case are void and of neither judicial nor administrative effect.

Exception No. 6. The Board failed to find any of the facts (uncontrovertibly established by the overwhelming weight of the testimony) existing in the instant case, which

differentiate the instant case from the facts found in the Dravo Corporation case, to wit:

(a) The "Agreement Between the United States of America and ..... Plant Guard," executed between each Plant Guard and the United States upon assuming a position as Plant Guard at the two Indianapolis Plants of the Respondent. (Employer's Ex. No. 2.)

(b) The special "Plant Guard Identification Guard," executed by Plant Guards, issued by the Auxiliary Military Police for Plant Guards stationed at the two Indianapolis Plants of the Respondent (Employer's Ex. No. 3); as opposed to the identification cards issued by the Respondent to its employees stationed at the two Indianapolis Plants of the Respondent. (Employer's Ex. No. 21.)

(c) The oath of office taken by each Plant Guard as a civilian auxiliary to the Military Police. (Employer's Ex. No. 2.)

(d) The four orders issued by the Continuous Security District Office of the War Department at Cincinnati, Ohio, dated May 10, 1943, May 11, 1943, May 12, 1943, and June 7, 1943. (Employer's Ex. Nos. 10, 11, 12 and 4.)

(e) Plant Guards are subject to court martial and were, and have been, court martialled, as members of the Military Forces. (Employer's Ex. Nos. 2 and 9.)

(f) General Orders of a Plant Guard, applying to all posts at the two Indianapolis Plants of the Respondent, are substantially similar in all relevant respects to the general orders of sentinels, as prescribed by the Basic Field Manual of the Soldier's Handbook, issued by the War Department for troops in active service on July 23, 1941. (Employer's Ex. Nos. 11 and 13.)

(g) Plant Guards are enrolled in the Auxiliary Military Police of the Army of the United States pursuant to a "Certificate of Enrollment," executed by a commissioned officer or officers of the United States Army. (Employer's Ex. No. 6.)

(h) Plant Guards who, upon discharge, have faithfully served as an auxiliary to the Military Police of the Army of the United States, are given a "Certificate of Meritorious Conduct," executed by a commissioned officer or officers of the United States Army. (Employer's Ex. No. 7.)

(i) Plant Guards who are discharged for cause are not entitled to a Certificate of Meritorious Conduct but are discharged informally by a commissioned officer of the United States Army. (Employer's Ex. No. 8.)

(j) The Respondent had no authority to hire any member of the Auxiliary Military Police but merely to recommend applicants for positions as Plant Guards, a commissioned officer in the United States Army, stationed in Cincinnati, Ohio, first investigating all such applicants and subsequently authorizing their permanent employment.

(k) The Respondent had no authority to discharge any member of the Auxiliary Military Police but merely to recommend discharge, a commissioned officer in the United States Army, stationed in Cincinnati, Ohio, having the sole right, after investigation, to effectuate a discharge.

(l) None of the incidents of the relationship between employer and employee at common law existed between the Respondent and the Plant Guards stationed at the two Indianapolis Plants of the Respondent with the sole exception of the incident that the Respondent paid the wages of such Plant Guards.

(m) The Respondent had absolutely no authority with respect to the duties of the Plant Guards stationed at the two Indianapolis Plants of the Respondent, or the way in which such duties were carried out.

(n) The Plant Guards stationed at the two Indianapolis Plants of the Respondent received their instructions and training at a special school conducted for the purpose by the United States Army.

And consequently such failure to find constitutes lack of due process in violation of the Fifth Amendment to the Constitution of the United States.

Exception No. 7. There is no support for the finding that "at a conference between the parties, the Company refused to recognize the Union, claiming that the unit requested was not appropriate." (page 2.) (See Transcript of September 24, 1943, pages 12, 17 and 87.) As a matter of fact the reason which Respondent assigned for not recognizing the Union was that the Plant Guards were not "employees" and the Respondent was not an "Employer," within the meaning of those words as used in the National Labor Relations Act.

Exception No. 8. The finding that "the Union represents a substantial number of 'employees' in the unit hereinafter found to be appropriate," is unsubstantiated by relevant testimony inasmuch as it is based upon the statement of a Field Examiner and evidence, which the Respondent never had an opportunity to examine or cross-examine, and such finding is consequently in violation of due process as prescribed by the Fifth Amendment to the Constitution of the United States.

Exception No. 9. There is no evidence that "a question affecting commerce has arisen concerning the representation of 'employees' of the Company within the meaning of Section 9(c) and Section 2(7) of the National Labor Relations Act."

Exception No. 10. There is no evidence to support the finding that "all plant guards at the Company's two Indianapolis Plants, * * * constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act."

Exception No. 11. The Trial Examiner erred in denying the Respondent's "Application for Subpoena Duces Tecum Directed at F. M. Richardson to Produce Union Records" (Employer's Ex. No. 1) because such denial constituted a deprivation of due process under the Fifth Amendment to the Constitution of the United States.

Exception No. 12. The Trial Examiner erred in admitting in evidence, over the objection of the Respondent, "Statement of Field Examiner Concerning Claims of Authorization for the Purpose of Representation," dated September 11, 1943 (Board's Ex. No. 4), inasmuch as the Re-

spondent was not permitted to cross-examine the individual who made the statement and to examine the data on which it was based, thereby depriving the Respondent of due process as guaranteed by the Fifth Amendment to the Constitution of the United States.

B—Exceptions to the Intermediate Report in the Unfair Labor Practice Case.

Exception No. 13. The finding that "Local 1683 admits to membership plant guards 'employed' by the respondent," is unsubstantiated by the evidence in the record or by any evidence found in the Findings of Fact.

Exception No. 14. There is no finding that the Plant Guards were "employees" of the Respondent within the meaning of that word as used in the National Labor Relations Act.

Exception No. 15. There is no finding that the Respondent was an "employer" within the meaning of that word as used in the National Labor Relations Act.

Exception No. 16. The statement that "no contention was advanced in the present proceeding attacking the Board's allegation that the Union is still the representative of the majority of the employees in the appropriate unit" is unsupported by the evidence because of the allegation of paragraph 4 of the "Answer of Respondent, E. C. Atkins and Company."

Exception No. 17. The finding (lines 21 to 32 of the Intermediate Report in the Unfair Labor Practice Case) that "all the plant guards * * * constitute a unit appropriate for the purposes of collective bargaining" in accordance with the "Board's previous determination of the unit question," is void because it is based entirely upon its determination of the same question in the Representation Case. Inasmuch as the determination in the Representation Case was based upon facts supporting the finding and was in disregard of uncontrovertible facts established by the overwhelming weight of the testimony in the Representation Case which differentiate the Representation Case from the facts in the Dravo Corporation case, such further finding in

the Unfair Labor Practice Case is also unsupported by the evidence.

Exception No. 18. The Intermediate Report in the Unfair Labor Practice Case has failed to re-examine the facts in the Representation Case or to examine such facts anew in the Unfair Labor Practice Case, all as set forth in the two briefs filed in the Representation Case and resubmitted as part of the record in the Unfair Labor Practice Case. (Board's Ex. Nos. 105 and 106.)

Exception No. 19. There is no evidence that "a question affecting commerce has arisen concerning the representation of 'employees' of the Company within the meaning of Section 9(c) and Section 2(7) of the National Labor Relations Act."

Exception No. 20. The Trial Examiner erred in denying the "Application for Subpoena Duces Tecum Directed at F. M. Richardson to Produce Union Records" (Respondent's Ex. 101) because such denial constituted a deprivation of due process under the Fifth Amendment to the Constitution of the United States.

Exception No. 21. There is no evidence to sustain the finding that "the Respondent refused to bargain collectively with the Union as the exclusive representative of the 'employees' in the appropriate unit, and that the Respondent has thereby interfered with, restrained and coerced its 'employees' in the exercise of the rights guaranteed in Section 7 of the Act," because the Plant Guards are not "employees" of the Respondent.

Exception No. 22. There is no evidence to support the finding that "the activities of the respondent * * * have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce."

III.

Exceptions to Conclusions of Law.

The Respondent excepts to the following conclusions of law for the reasons stated:

A—Exceptions to Decision in Representation Case.

Exception No. 23. The Board was in error in directing an election by secret ballot among the Plant Guards, inasmuch as such Plant Guards were not "employees" of the Respondent, and to the extent that such direction of election was intended to bind the Respondent as the "employer" of such Plant Guards.

Exception No. 24. The direction of election is void because the facts found by the Board do not warrant such a direction of election as against the Respondent.

Exception No. 25. The direction of election is not supported as a matter of law and is in violation of due process as prescribed by the Fifth Amendment to the Constitution of the United States.

B—Exceptions to the Intermediate Report in the Unfair Labor Practice Case.

Exception No. 26. The conclusion that the Union is a "labor organization within the meaning of Section 2(5) of the Act" is unsupported by any evidence if the implication is to be drawn therefrom that such Union numbers among its membership any "employees" of the Respondent within the meaning of that word as used in the National Labor Relations Act as concluded in paragraph 1.

Exception No. 27. There is no evidence to support the conclusion that "all plant guards * * * have constituted a unit appropriate for the purposes of collective bargaining, within the meaning of Section 9(b) of the Act," as concluded in paragraph 2.

Exception No. 28. The Union has never been the "exclusive representative of all 'employees' in said unit,"

within the meaning of the word "employees" as used in the National Labor Relations Act, as concluded in paragraph 3.

Exception No. 29. The Respondent at no time refused to bargain collectively with any exclusive representative of its "employees," as concluded in paragraph 4.

Exception No. 30. The Respondent has never, with reference to the Plant Guards stationed at its two Indianapolis Plants, interfered with, restrained, and coerced "employees" in the exercise of the rights guaranteed in section 7 of the Act or engaged in any unfair labor practices within the meaning of Section 8(1) of the Act, as concluded in paragraph 5.

Exception No. 31. The Respondent at no time was guilty of any unfair labor practices as concluded in paragraph 6.

IV.

Exceptions to Recommendations in the Intermediate Report in the Unfair Labor Practice Case.

Exception No. 32. Recommendation 1 is not supported by the facts or the law because the Plant Guards at the two Indianapolis Plants of the Respondent are not "employees" of the Respondent as an "employer," within the meaning of those two words as used in the National Labor Relations Act.

Exception No. 33. Recommendation 2 is not supported by the facts or the law because the Plant Guards at the two Indianapolis Plants of the Respondent are not "employees" of the Respondent as an "employer," within the meaning of those two words as used in the National Labor Relations Act.

V.

General Exceptions.

The Respondent further excepts to the Intermediate Report, Record, and Proceedings in this case, for the reasons stated:

Exception No. 34. The relationship of employer and

employee, with its various incidents, has never existed as between the Respondent and the Plant Guards in the instant case, and consequently the relationship between the Respondent and such Plant Guards is not subject to the jurisdiction of the National Labor Relations Board under any of the provisions of the National Labor Relations Act.

Exception No. 35. The Union purports to represent Plant Guards at various other plants in the Indianapolis area, which Plant Guards have not been sworn into the Military Service under the articles of war; and the collective bargaining agreements executed between the Union and the corporations at which such Plant Guards are stationed, respectively, would, if produced by the Union, have been shown to contain provisions respecting seniority, discipline, handling of grievances, vacations, hours of work, and other incidents of tenure, which are incompatible with the articles of war and military orders pursuant to which the Auxiliary Military Police at the Plants of the Respondent are subject to the jurisdiction of the Continuous Security District Office of the War Department of the United States of America, located in Cincinnati, Ohio; and consequently any order directing the Respondent to bargain with respect to such incidents of employment with the Plant Guards at the Plants of the Respondent is void and of no force and effect.

Exception No. 36. The Decision in the Representation Case and the Intermediate Report in the Unfair Labor Practice Case are both void because the National Labor Relations Board denied the repeated written requests of the Respondent for permission to appear before the Board and make oral argument of the issues raised by the Respondent; the Respondent never having been permitted to address argument respecting Respondent's points to any member or representative of the Board, who prepared the Decision in the Representation Case, the Certification thereon entered November 29, 1943, or the Intermediate Report in the Unfair Labor Practice Case.

Wherefore, the Respondent prays that the Board accept the foregoing "Statement of Exceptions to Intermediate Report, Record, and Proceedings," filed for record on or

prior to Thursday, March 9, 1944 (the latter date being fifteen days from the date of the entry of the order transferring the case to the Board), in order that the Respondent's exceptions taken herein may be taken and protected pursuant to the provisions of Article I, Section 33, of the Rules and Regulations, Series 3, of the National Labor Relations Board; that the record in the Representation Case be made a part of the record in the Unfair Labor Practice Case as contemplated by the provisions of Section 9(d) of the National Labor Relations Act; that the Board accept the two briefs heretofore filed by the Respondent (Board's Ex. Nos. 105 and 106) as the briefs permitted by Section 33 of said Rules and Regulations; and that the Respondent be permitted to argue its points orally before the Board upon the issues raised by such Statement of Exceptions and said Briefs.

Dated at Indianapolis, Indiana, March 6, 1944.

E. C. Atkins and Company,
By Barnes, Hickam, Pantzer & Boyd,
By Kurt F. Pantzer,
Its Attorneys.
1313 Merchants Bank Building,
Indianapolis, Indiana.

Kurt F. Pantzer,
Lewis D. Spencer,
Of Counsel.

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1 BEFORE THE NATIONAL LABOR RELATIONS BOARD,

Ninth Region.

In the Matter of:
E. C. Atkins and Company
and
International Association of Machinists, District 90 and their affiliate, Local 1683.
} Case No. 9-R-1200.

Room 247, Federal Building,
Indianapolis, Indiana,
Friday, September 24, 1943.

The above-entitled matter came on for hearing, pursuant to notice, at 1:30 o'clock p. m.

Before:

Thomas E. Shroyer, Trial Examiner.

Appearances:

Mr. Kurt F. Pantzer, 1313 Merchants Bank Building, Indianapolis, Indiana, and Mr. Lewis D. Spencer, 1313 Merchants Bank Building, Indianapolis, Indiana, for E. C. Atkins and Company.

Mr. F. M. Richardson, 49½ South Delaware Street, Indianapolis, Indiana, and Mr. Walter B. Heisel, Jr., 49½ South Delaware Street, Indianapolis, Indiana, for the International Association of Machinists.

• • • • •

3 PROCEEDINGS.

Trial Examiner Shroyer: The hearing will come to order. This is a formal hearing in the matter of the E. C. Atkins and Company and International Association of Machinists, District 90 and their affiliate, Local 1683.

• • • • •

Trial Examiner Shroyer: May I ask if there are present at the hearing any other interested unions or parties? Let the record show that no one answered the Examiner's question. I believe you stated you had a motion to make, Mr. Pantzer?

Mr. Pantzer: I have. I wish to say that my motion at this time would be premature, and so I shall renew it at the close of all the evidence. The employer, E. C. Atkins and Company, moves to dismiss the petition for investigation, which is included in Board's Exhibit 1, for the reason that E. C. Atkins and Company is not and cannot be an employer within the meaning of Section 2, Subsection 2 of the National Labor Relations Act with respect to Auxiliary Military Police who wholly constitute the bargaining unit set forth in Item 4 of the Petition for Investigation, and further, for the reason that the employees referred to in such Petition cannot come within the definition of the word "employees" under the provisions of Section 2, Subsection 3 of the National Labor Relations Act with respect to the alleged employer, E. C. Atkins and Company, they are not in the sense in which the word "employee" is used in the Statute, the relationship of employer and employee with their various interests never having set in and not at this time existing.

Trial Examiner Shroyer: At this time the testimony will refer to motion to dismiss and go to the Board for ruling. You may renew your motion at the close of the hearing if you desire.

Mr. Pantzer: For the purpose of the record then, if you are going to refer it to the Board, so that there will be no failure on my part through oversight, I wish the motion to be renewed.

Trial Examiner Shroyer: It may be so considered.

Mr. Pantzer: Does that have your permission?

Mr. Richardson: Yes, sir.

Mr. Pantzer: Thank you.

* * * * *

Trial Examiner Shroyer: Mr. Richardson, do you accept the statement?

Mr. Richardson: I do, yes, sir.

Trial Examiner Shroyer: It may be so accepted. Thank you very much, Mr. Pantzer, for a very complete statement. I appreciate it.

Mr. Pantzer: We are also willing to make the admission that we are engaged in interstate commerce within the meaning of the jurisdictional provisions of the National Labor Relations Act.

Trial Examiner Shroyer: Thank you very much. Mr. Pantzer, will you stipulate that International Association of Machinists, District 90 and their affiliate, Local 1683, is a labor organization, at least within the meaning of Section 2, Subsection 5, National Labor Relations Act?

Mr. Pantzer: Naturally, because of the motion I made at the beginning of the case, I should prefer not to enter into that stipulation but to hear the evidence on it, and if I might at this moment depart from the usual order of procedure in these hearings, I should like to submit to you an application for subpoena duces tecum directed at F. M. Richardson to produce union records, which I have marked for identification as Employer's Exhibit No. 1, the original of which I hand to you, and a copy of which I hand to Mr. Richardson for his information.

Trial Examiner Shroyer: I notice, Mr. Pantzer, you marked this Employer's Exhibit No. 1.

Mr. Pantzer: For identification.

Trial Examiner Shroyer: Is there any objection?

Mr. Richardson: No objection.

Trial Examiner Shroyer: There being no objection, Employer's Exhibit No. 1 is admitted.

(Whereupon, the document heretofore marked for identification as EMPLOYER'S EXHIBIT NO. 1 was received in evidence.)

Trial Examiner Shroyer: Now, with reference to the application for subpoena duces tecum directed at Mr. Richardson, the testimony will correct the application insofar as Number one is concerned, for the charter, constitution, and bylaws of the union. I wish, however, Mr. Pantzer, before I rule the second part, if you will state for the record just how the things requested under Number 2 would go to show whether or not this was a labor organi-

zation within the meaning of Section 2, Subsection 5½. Do you wish to comment further than the motion and the
12 paper itself?

Mr. Pantzer: It is the contention of the Employer that the word "Employee" as used in the Wagner Act has the common law definition of "Employee" and that the word "Employer" has the common law definition of "Employer" except to the extent that the Wagner Act may expressly have changed the meaning at common law. That position has been supported by a number of decisions of the Supreme Court, notably the decision of Chief Justice Hughes in the VonSteigl case. When I stated that the incidence of the relationship of employer and employee at common law remained the same under the Wagner Act except to the extent that those incidents might have been changed. One of those incidents which had been changed was, as the Examiner said, the right to discharge an employee for striking. He said, "The right so to discharge had existed at common law unless it was affected by the language of the Act, continued." He pointed out that the language of the Act had changed. That incident had abrogated the right to discharge for striking, but that it had not abrogated any of the other incidents of discipline, of power over the employee that the employer had at common law. With that preface now, I turn to the question of the Examiner. It is the contention of the Employer that the search of the documents referred to in Item 2 of the Application for subpoena duces tecum will throw a light
13 upon the major thesis of the Employer; namely, that the relationship of the employer and employee cannot exist in the case of an employer subject to Federal supervision by the Military and an employee actually enrolled in and sworn into the Military. Many of the incidents of the relationship between employer and employee at common law are not abrogated and do not and cannot exist under such circumstances.

Now, for instance, the minute book of the union may well throw light upon the manner in which the union proposes to proceed. If the purposes of organizing this par-

ticular union are sufficiently definite, we may even establish by the facts adduced from that book that the union is attempting to organize employees of the United States, which is expressly prohibited by the Wagner Act.

Certainly those documents will help to throw light upon the relations which exist in this particular case—constrained, restricted, cramped, straight-jacketed as it is by Military supervision. I cannot say to you definitely what particular fact I shall find in those books. They have not been made available to me, but it is the same kind of information which the Labor Board is accustomed to experience from employers—lists of employees, minute books, correspondence, corporate records, pay rolls, treasury data, matters of that sort.

14 Trial Examiner Shroyer: At this time the Examiner will acknowledge your request for subpoena duces tecum as to the items mentioned in Number 2 of your request.

With reference to the charter or constitution and bylaws, do you have those available, Mr. Richardson?

Mr. Richardson: Yes.

Trial Examiner Shroyer: Do you have them with you?

Mr. Richardson: No, sir. I didn't carry a charter 3x4 feet.

Trial Examiner Shroyer: I suggest we take a five-minute recess and have them brought to the court room.

Mr. Richardson: Do you want that charter brought here?

Trial Examiner Shroyer: Yes. I have no doubt, Mr. Pantzer, you will be satisfied with a copy of the charter?

Mr. Pantzer: I should like to have a photostat of the thing made or a typewritten copy and have that put in evidence rather than deface the charter, which naturally you want to keep in as nice condition as possible.

Mr. Richardson: We have no photostatic copy. We have the charter, the constitution, and the bylaws.

Trial Examiner Shroyer: May I suggest we take a five-minute recess while you go and telephone your office girl and have her make a typewritten copy of what is on the

face of the charter and bring both the charter and the copy to the hearing. We will take a five minute recess.

15 (Whereupon a five-minute recess was taken.)

Trial Examiner Shroyer: Mr. Richardson informs me that he has made arrangements to have the constitution and bylaws brought in. We might skip that point for the moment and proceed.

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17 Trial Examiner Shroyer: At this time, I am marking Board's Exhibit 4 for identification, which is a statement of field examiner concerning claims of authorization for the purpose of representation.

Mr. Pantzer: May the record show that it is not because of anything personal with Mr. Richardson and his associates that that position is taken, but for the reasons already indicated by the Employer's motions and statements heretofore.

Trial Examiner Shroyer: I will not hand Board's Exhibit 4 which I have marked to the parties for examination.

Mr. Pantzer: The Employer objects to the introduction of Board's Exhibit 4 for the reason that it purports to introduce into the record so that the information is not available, or subject, to examination or cross-examination by the Employer. Information from membership cards, the application for subpoena to adduce which has been

18 denied by the Trial Examiner. The Employer further objects to the introduction of Board's Exhibit 4 because the information therein contained is pure hearsay and further because the information therein contained is not the best evidence, being that the best evidence would be the membership cards themselves.

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20 Q. What, in general, do guards do?

A. In general they guard the plant, supposed to obey all the general orders and specific orders which the Company asks us to obey.

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21 Q. Now, with regard to workers, do you observe the production workers? Do you observe them at their

posts? Do guards go through the plant and watch production workers and what they are doing?

A. At times we do.

Q. If you see a production worker doing something wrong, what you thought was wrong, what would you do?

A. I would see my lieutenant and tell him and he probably would take it up with our chief or maybe, if the chief can't be located, he would see his foreman about it.

Q. In other words, if you saw a production worker doing something you thought was wrong or out of line
22 or might be sabotage, you would not correct that production worker. You immediately report to your superior?

A. Well, that depends. If he is doing something drastically wrong, right there, of course I would take it upon myself to protect the plant, but if it was a minor thing, of course, for instance, he got, oh, got a little bit up in the air about showing his pass, then I would; sometimes, not often, a fellow will really get up in the air about your asking him to show his lunch kit or open a package, well, I would report anything like that to the lieutenant and he would take it up with the proper one.

Q. Do you, when you are hired and go to work there, are you told to take any disciplinary action over anybody in the plant? Do you have any right to arrest anybody in the plant without first calling your superior?

A. Yes, we do.

Q. However, the main thing you do is report it to your immediate superior, is that right?

A. That's right.

Q. If you see things out of line?

A. Yes, regardless whether the arrest is made or not. It is reported to our superior.

Q. Immediately?

A. As soon as possible.

* * * * *

24 A. That's right. I have that in my billfold right now.

Q. May I look at that, please?

A. Here is the card.

Q. Have you an identification card?

A. Here it is.

Q. When you were enrolled at the Atkins plant then you signed this document which you have just produced
25 from your wallet, an unsigned copy of which, with all blanks vacant, marked Employer's Exhibit No. 2, I show to you. That is marked for identification.

A. That's right. It's identical.

Q. It's identical? And the blanks are filled in as follows: Are they not, Mr. Gann? The top blank has your name, Walter C. Gann? The next blank being the one in the second paragraph, has again your name, Walter C. Gann—the first one in the second paragraph? The second blank, E. C. Atkins and Company, and the third blank, 402 South Illinois Street, and then the contract is signed at the right, Walter C. Gann, and at the left, High A. Johnston, Chief of Guards, January 27, 1943?

A. That's right.

Mr. Pantzer: The Employer now offers in evidence Employer's Exhibit 2, giving a copy thereof to Mr. Richardson for his file.

Trial Examiner Shroyer: Is there any objection, Mr. Richardson?

Mr. Richardson: No.

Trial Examiner Shroyer: Admit it as Employer's Exhibit No. 2.

(Whereupon, the document heretofore marked for identification as EMPLOYER'S EXHIBIT NO. 2 was received in evidence.)

26 Q. (By Mr. Pantzer.) You have produced from your wallet the identification card of which you spoke, entitled Plant Guard Identification Card, signed by B. R. Wetenhall, Captain Corps Military Police, District Plant Guard Officer, Continuous Security District Office, Cincinnati, Ohio, is that right?

A. Yes, sir.

Q. Now I ask you, in order that you don't have to put your card in evidence, and in that way not get it back, whether in all substantial particulars excepting the name, the date, and so forth, it is similar to the plant guard

identification card which I show you in photostatic form of Henry A. Johnston, and which I have designated as Employer's Exhibit No. 3?

A. Yes, sir.

Q. And this has been blown up and the blank put across it in white so as not to violate the regulations against counterfeiting such cards. Mr. Gann, that is the only reason it is blown up.

A. Surely, and that is identical with the guard picture which I have.

Q. I now offer Employer's Exhibit No. 3 in evidence and hand the copy to Mr. Richardson.

Trial Examiner Shroyer: Is there any objection, Mr. Richardson?

27 Mr. Richardson: No.

Trial Examiner Shroyer: If there is no objection, it is admitted as Employer's Exhibit No. 3.

(Whereupon, the documents heretofore marked for identification as EMPLOYER'S EXHIBIT NO. 3 was received in evidence.)

Q. (By Mr. Pantzer.) Mr. Gann, in addition to signing the contract with the United States Government, which is Employer's Exhibit No. 2, you also were sworn in, is that right?

A. That's right.

Q. And in addition to that contract you took a verbal oath of office to support the Constitution of the United States in substance and the Military authorities?

A. Yes, sir.

Q. That oath was almost identical with certain of the language in the contract, is that not so?

A. That's right.

Q. Or do you recall?

A. Yes, that's right.

Q. You stated on your direct examination that you obey all general orders for the Company that it has to obey. Did you not mean all general orders?

A. No, the general orders are Government orders.

Q. They are Government orders?

A. And special orders are from the Company.

Q. By the general orders you mean they are issued by the Government itself?

A. That's right.

Q. And as between a Government order and a Company order, which do you consider as having priority?

A. Well—

Q. The Military?

A. I would say one would be just as important as the other. The general orders deals with our particular—deals with the guard at general, while special orders would deal with some particular post and I would say one was just as important as the other.

Q. Well, these special orders then relate to your military duties?

A. That's right.

Q. By whom are they issued?

A. They are issued by the company commander.

Q. Who is the company commander?

A. Mr. Wetenhall, of course, of the Government. I mean now the Government issues the general orders, but I mean we get all of the dope, procedure, from Mr. Wetenhall pertaining to the Auxiliary Military Police. The general orders originate from the Company.

Q. How do you spell that name?

A. Wetenhall, W-e-t-e-n-h-a-l-l.

Trial Examiner Shroyer: The same man who signed the card which he has in his possession and also Employer's Exhibit No. 3?

The Witness: Yes.

Trial Examiner Shroyer: Thank you.

Q. (By Mr. Pantzer.) It is not Mr., but captain, is it not?

A. That's right.

Q. And when you said "company orders" you did not mean the E. C. Atkins company, but the military company to which you belong? They are the lieutenants, the assistant chief, the chief, and then Lt. Scanlon and Capt. Wetenhall?

A. Well, that's true.

Q. Special orders come from that company?

A. What I meant was they are different from the general orders in this way, that they apply to a particular post while the general orders are for the whole guard in general.

Q. So that your obligations to carry out specific tasks are directed by Capt. Wetenhall, Lt. Scanlon, Chief Johnston, the four lieutenants under Chief Johnston, and the military regime that you are working with?

A. That's right.

Q. Do I understand that you swore to observe and obey the Articles of War?

A. That's right.

Q. Do I understand that you swore to observe and obey the Articles and these Articles are read to you and that you are required to study them?

A. Yes.

Q. Where does that course of instruction take place?

A. We have military school each Monday for a period.

Q. Where is that situated? At the plant?

A. At the Ipalco Club Building. Indianapolis Power and Light Building. Each Monday for a period of one hour.

Q. Located near the plant?

A. No, not near the plant.

Q. Under military supervision?

A. That is true.

Q. Who conducts the classes and instruction there?

A. An army lieutenant.

Q. Lt. Scanlon?

A. Lt. Scanlon.

Q. And he is a regular lieutenant?

A. That is right.

Q. He worked his way up through the ranks?

A. I imagine he did unless he got a commission.

Q. You don't know then?

A. No.

Q. When you undertake to arrest anyone while you are on your post, you do it by virtue of the authority of the Military authorities, is that not right?

A. That's right.

Q. Have you ever studied the Manual of Interior Guard Duty?

A. Yes, sir, when I first went to work at the plant, I studied the Interior Guard Book.

Q. You were familiar with the fact that your general orders are to take charge of this post and all plant and Government property?

A. That's right.

Q. "To walk my post in a military manner keeping always on the alert and observing everything that takes place within sight or hearing"?

A. Yes.

Q. "To report all violations of orders I am instructed to enforce"?

A. Yes.

Q. Who instructs you to enforce those orders?

A. The Government.

Q. The Military? The Military Government?

A. Military Government.

Q. Military Police?

A. That's right.

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34 Q. That's right, as I understand it. But you were sworn in, I believe, on the 27th of January, is that the date on your card?

A. Yes, sir.

Q. From the 21st of January to the 27th of January you were an employee of E. C. Atkins and Company?

A. Yes, sir.

Q. They pay you whether you are their employee or whether you are a military policeman, but from January 27 you became a military policeman and were no longer an employee of E. C. Atkins and Company, as you had been up to January 27? Your status changed, did it not?

A. That's right. I wasn't a member of the Auxiliary Military Police until I was inducted January 27.

Mr. Pantzer: In order that the Trial Examiner and Mr. Richards may both follow the thought of this examination, I beg to offer in evidence Employer's Exhibit No. 4, which is the directive from which I have just cross-exam-

ined Mr. Gann and which has the paragraph that I referred to, Paragraph No. 25, in it. Mr. Richardson may want to do some redirect examination later on and I want to make the document available.

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36 *Redirect Examination.*

Q. (By Mr. Pantzer.) Is this a local that repre-
37 sents employees of more than just the Atkins plant?

A. Yes, sir.

Q. What are the other plants represented?

A. Well, I know the Curtiss-Wright.

Q. The Curtiss-Wright Corporation, Propeller Division Plant in Indianapolis.

A. The Morris and Kentucky Avenue plant, isn't it?

Q. The old Marmon plant.

A. Yes.

Q. Are they all in the same local that's trying to organize the Atkins company?

A. That's correct.

Q. What other plants are represented in the membership of that local?

A. Marmon-Harrington Company, Merz Engineering, Indianapolis Tool and Die Company. The Marmon-Harrington Company manufactures tanks.

Q. For the armed forces, does it not?

A. I believe so.

Q. It is a pioneer in tank manufacture under the leadership of Col. Harrington.

A. That's right.

Q. The Tool and Die Company has no direct war contracts, has it?

Mr. Richardson: He is mistaken. It is not the
38 Tool and Die Company. It is the International Machine Tool Company, rather than the Indianapolis Tool and Die.

Witness: That was a mistake on my part.

Q. (By Mr. Pantzer.) If this union organizes the Atkins company it will not be a separate local covering just

so-called Atkins' employees, but employees of these other plants you have mentioned and perhaps other plants in addition thereto?

A. Well, I am not sure about that. I know only the guards of our plant and the guards of Fall Creek Ordnance are going to be the only guards under the one contract if it is recognized. I know that. But whether the guards of all plants are under the same charter, I do not know.

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39 Q. I notice in an answer of one of Mr. Pantzer's questions, you said the company may have special orders that they wish to perform. Have you ever been directed to carry on any special orders?

A. Yes, at one post in particular, where the trucks come in and of course they go out at another gate, unless it is a necessity that they go out that same gate. We have a special order pertaining to those trucks, once in a 40 while a special order.

Q. What kind of an order would you have as an example?

A. Well now, we have certain truck companies that get in on a little different procedure from what other companies do and we may receive special order through that one particular company, see? Of I mean we may receive a special order pertaining to that one company.

Q. Who gives the special order?

A. From the chief.

Q. That is all.

Trial Examiner Shroyer: Are there any further questions?

Mr. Pantzer: Yes.

Recross Examination.

Q. (By Mr. Pantzer.) Yes, you said in answer to a question by the Trial Examiner that Mr. Woods and Mr. Atkins were your supervisors. As a matter of fact, they are not your supervisors?

A. I didn't mean—I didn't understand what he said.

Q. I thought your answer was wrong.

A. You meant of the guards. I didn't understand that. I meant over the guard.

Q. Is it not true that the person superior to Chief Johnston is in the Military Police structure, or do you actually know?

41 A. Oh, yes, I am absolutely sure.

Q. The captain we referred to there is Capt. Wetenhall who signs all major orders down in Cincinnati?

A. That is right.

Q. He comes up and inspects at least once a month or once every two weeks, is that right?

A. I haven't ever been present when he came it. He goes in at the main office.

Q. You heard that he has been around?

A. Yes.

Q. Lt. Scanlon is under him?

A. That's true.

Q. And under him come the two chiefs, Chief Johnston at your plant and Chief Hann at the Fall Creek Ordnance plant?

A. That's right.

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45 Q. I notice this is Local Lodge No. 1683. You heard the last witness testify to the effect the local admitted to membership employees of concerns other than the Atkins company?

A. That's right.

Q. Did he correctly state the names of the other companies?

A. Yes.

Q. Does Local Lodge No. 1683 have a contract with any of these other companies?

A. Yes.

Q. Will you mention the ones it does have a contract with?

A. It has a contract with everyone we mentioned—Curtiss-Wright, Merz Company, Marmon-Harrington, and International Machine and Tool.

Q. And those are contracts between the Local and the companies covering wages, hours, and working conditions?

A. Yes, sir.

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47 Q. I refer you now to Petitioner's Exhibit No. 2 which is the typewritten copy of the charter and ask you whether any plant guards stationed at E. C. Atkins Company are charter members on that list?

A. They are not.

Q. Those names on that charter all come from other plants, is that right?

A. That's right.

Q. Do you have a closed shop at Curtiss-Wright Corporation?

A. We do not.

Q. Do you have a closed shop at any of the other plants?

A. We do.

Q. Which ones?

A. All three of the others that I mentioned.

Q. Are you going to attempt to obtain the closed shop at E. C. Watkins Company?

A. I wouldn't want to answer that question.

Q. Will you answer this question, whether or not in your campaign for membership you have told persons
48 that you would have a closed shop?

A. I didn't.

Q. Do you know whether those making solicitation of membership have made such statements?

A. I do not know.

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52 Q. Do you have with you your plant card, that is, the Plant Guard Identification Card?

A. Yes, sir.

Q. Will you kindly produce it and compare it with Employer's Exhibit No. 3 and state whether or not Employer's Exhibit No. 3 is an accurate and enlarged photostatic copy of the front and reverse of your Plant Guard Identification Card?

A. That's it, yes, sir.

Q. State whether or not you can tell from the Plant Guard Identification Card when you were sworn in to the military service?

53 A. I can't tell from this identification. Yes, that is right. (Looking at it.) That is the new edition. That is not the one I originally went to work with.

Q. This pass supplants the old one which you had?

A. This pass supplants the old one which I had to turn in to the Federal Government.

Q. This one, Employer's Exhibit No. 3 is a reissue of the original card which you received?

A. Yes, sir. There have been some slight changes but it is the same basic thing.

Q. Do regular employees in the Production and Maintainance Departments of E. C. Atkins and Company have issued to them Plant Guard Identification Cards?

A. No, sir.

Q. They have issued entirely different identification cards?

A. Yes, sir.

Trial Examiner Shroyer: Mr. Pantzer, did you intend to offer that application of employment?

Mr. Pantzer: The Employer offers Exhibit No. 5 in evidence.

Trial Examiner Shroyer: Is there any objection? It may be admitted as Exhibit No. 5.

(Whereupon the document heretofore marked for identification as EMPLOYER'S EXHIBIT NO. 5 was received in evidence.)

54 Q. (By Mr. Pantzer.) When you were finally notified that you had been accepted for the Auxiliary Military Police, did you then and only then sign a copy of Employer's Exhibit No. 2 by an agreement between the United States of America and yourself?

A. Well, that exhibit there is signed by the guard, the member of the Auxiliary Military Police. He is not yet a member. He signed that agreement and oath with the United States and that in turn is immediately forwarded to the Continuous Security District Office and then this pass is issued upon receipt after thorough checking has been given. It's issued on that contract. When you receive this pass then you know that you have been accepted by the Government as one of their representatives in the plant.

Q. If you had failed to sign that agreement, it is true is it not, and I read from Employer's Exhibit No. 4, Item 20: "If a guard refused to sign the agreement, he may, but need not be temporarily retained with the understanding that he will be dismissed as soon as he is replaced and in any event, within a reasonable time."

A. Yes, sir, that's true.

Q. So that if you had not signed the copy of Employer's Exhibit No. 2, which was submitted to you, you would have been dismissed?

A. That's right.

55 Q. You could not have continued to act as an Auxiliary Military Police at the Atkins plant?

A. No, you couldn't.

Q. Upon your having been sworn into the Service, state whether or not there was issued to you a certificate of membership?

A. Yes, sir, there was.

Q. I now show you Employer's Exhibit No. 6 and ask you whether that is a photostatic copy of the certificate of employment which is issued to you?

A. Yes, sir, that's it.

(Whereupon, the document above referred to was marked for identification as Employer's Exhibit No. 6.)

Q. It is under that certificate that you hold your authority as an Auxiliary to the Military Police at this time?

A. That's right.

Q. I note that on that certificate the rank has been left blank. What is your rank?

A. I am the Chief, sir.

Q. Is this the commission that was issued to you when you became chief?

A. Yes, sir.

Q. In other words, I note it is dated June 29, 1943, although you originally joined in 1942?

56 A. Yes, sir, that's right.

Q. At that time you were promoted to chief?

A. No, sir, I have been chief all along.

Q. You were hired as chief?

A. Yes.

Q. Do you know whether any investigation of you was made prior to this, to your being appointed chief?

A. I have been told by army officers that there is a careful investigation made of each man and naturally if anything is found on the record proving that he is not the right type of man for that job, he is not allowed to become a member of the Auxiliary Military Police.

Q. That investigation is made by the Military Authorities?

A. Yes, sir, that is my understanding that it is made by the Cincinnati office.

Q. And it isn't made by the personnel office of E. C. Atkins and Company?

A. No, sir, not to my knowledge.

Q. So that your qualifications to serve as an Auxiliary to the Military Police of the Army of the United States are in the first instance examined by the United States Army and not by the personnel office?

A. That's right, yes.

Q. And you know that that is the process because since your appointment as chief you have become thor-
57 oughly conversant with the practices in that respect?

A. Yes, sir.

Q. I now show you—

Trial Examiner Shroyer: Did you offer?

Mr. Pantzer: I offer Employer's Exhibit No. 6 in evidence.

Trial Examiner Shroyer: If there is no objection, it is admitted as Employer's Exhibit No. 6.

(Whereupon the document heretofore marked for identification as EMPLOYER'S EXHIBIT NO. 6 was received in evidence.)

Q. (By Mr. Pantzer.) I now show you Employer's Exhibit No. 7 and ask you what that is a photostatic copy of?

(Whereupon, the document above referred to was marked for identification as Employer's Exhibit No. 7.)

A. That is an honorable discharge issued by the United States Government, Col. Rasmussen being the representa-

tive of the Government. That is an honorable discharge from the Auxiliary Military Police and it relieves a man from duty.

Q. Whenever a man is discharged from the Military Police, who discharges him, the personnel office at E. C. Atkins and Company or the Military?

A. The Military discharges him from the Auxiliary Military Police. Now there is one thing that should
58 be said there. He can be relieved of his duty temporarily by myself or by E. C. Atkins and Company, problematically for breaking some rule or otherwise proving that he is not doing his duty, he could be relieved temporarily but he could not be discharged by E. C. Atkins and Company.

Q. That is true by virtue of Section 25 of the Directive which is Employer's Exhibit No. 4, which reads: "A member of the Auxiliary Military Police may not be employed, dismissed or may not resign if the plant guard officer or other responsible army representative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto." Is that right?

A. That's right.

Q. Are members of the Military Police, Mr. Witness, ever discharged without an honorable discharge?

A. Yes, sir, they are.

Q. In other words, they are discharged for misconduct, absence without leave, drunkenness, for some military reason?

A. Yes, sir.

Q. I now show you Employer's Exhibit 8 and ask you whether that is the form in which such discharges take place, it being a discharge referring to the termination of Aye Eldridge.

(Whereupon, the document above referred to was marked for identification as Employer's Exhibit 8.)

59 Mr. Pantzer: I offer them in evidence later.

A. Yes, sir, that would be a dishonorable discharge.

Q. I now show you Employer's Exhibit No. 9, entitled "The Articles of War" and Appendix 1 to a Manual for

Courts Martial, U. S. Army, and ask you whether or not that is a publication promulgated by the Military Police?

A. Yes, sir, you take these copies from the army office. That is the Articles of War.

Q. What do you know about the Articles of War?

A. Every soldier, every sailor, every marine, every member of the Auxiliary Military Police, according to the Articles of War, must have read to him within six days of his enlistment, must have read to him the Articles of War and also according to the Articles of War, he must have them read to him every six months thereafter. That is the Articles of War itself, I believe. These are the regulations under which a soldier lives.

Q. Now, how do you receive the general orders for your duties, from what source?

A. General orders are received from Capt. Wetenhall of the Fifth Service Command, Cincinnati.

Q. I now offer in evidence Employer's Exhibit 7, 8, and 9.

Trial Examiner Shroyer: Are there any objections?

Mr. Richardson: No.

60 Trial Examiner Shroyer: There are no objections and they may be admitted in evidence as 7, 8 and 9.

(Whereupon, the documents heretofore marked for identification as EMPLOYER'S EXHIBITS 7, 8 and 9 were received in evidence.)

Q. (By Mr. Pantzer.) I now show you Employer's Exhibits No. 10, 11 and 12 and ask you what they are.

(Whereupon, the documents above referred to were marked for identification as Employer's Exhibits 10, 11 and 12.)

A. These are general orders from Capt. Wetenhall of the Fifth Service Command District Plant Guard Officer, who is over all the Auxiliary Military Police in this District. These three orders take up different subjects and they are to be followed.

Q. Has General Order 4 been published as yet, to your knowledge?

A. Not to my knowledge, no, sir. These are the three general orders under which we are working.

Q. They are the three orders under which you work?

A. Yes, sir.

Q. I ask you whether or not it is customary in order that all may be advised in addition to the chiefs who are in charge of the Military Police to have the various guarding orders photostated and blown up like this one I have in my right hand here so that everybody will know exactly what the authorities, duties and powers of the Military Police are? I read now from Guard Order No. 1 which is a photostatic replica enlarged four times, of Employer's Exhibit No. 10 and point out to you Article 1. "Pursuant to the orders of the War Department, the guard forces at this plant were activated as Auxiliary Military Police, and for military purposes will be commanded, drilled, and instructed as military units."

61

A. That is right.

Q. Item 2, "All members of the guard force are subject to the Articles of War and may be court-martialed or otherwise punished for violations thereof." Is that right?

A. Yes, sir.

Q. And I read Article 4: "The mission of this guard force is to provide protection for this plant. In addition to its normal functions, the force or any member thereof, whether on or off duty, is available for military use in any emergency, whether it be the result of flood, fire, or other disaster; internal disorders hazardous to the plant property or its production; or enemy action of any nature. No conflicting interest of any kind will be permitted to interfere with the successful accomplishment of this mission." I ask you whether that underlined sentence, the last sentence I read, is one which is emphasized in the training and instruction which is accorded to the Military Police?

62

A. Yes, sir.

Mr. Pantzer: I now offer Employer's Exhibits No. 10, 11, and 12 in evidence.

Trial Examiner Shroyer: Is there any objection? If not, they may be admitted.

(Whereupon, the documents heretofore marked for iden-

tification as EMPLOYER'S EXHIBITS 10, 11, and 12 were received in evidence.)

Q. (By Mr. Pantzer.) Are you familiar with the Manual of Interior Guard Duty?

A. Yes, sir, I am.

Q. I show you Field Manual 20-100 issued by the War Department which is called The Basic Field Manual or the Soldier's Handbook, edition of July 23, 1941, and ask you to look at Page 136 and 137 thereof.

A. Yes, sir.

Q. I now show you Employer's Exhibit No. 13 and ask you whether that is a photostatic copy of the face of that basic field manual?

A. Yes, sir.

Q. And pages 136 and 137?

A. Yes, sir, that's it.

Mr. Pantzer: The Employer now offers Employer's Exhibit No. 13 in evidence.

63 (Whereupon, the document heretofore marked for identification as EMPLOYER'S EXHIBIT NO. 13 was received in evidence.)

Q. (By Mr. Pantzer.) Calling your attention to the almost identical wording of the General Orders of the Military Guard in active military duty and the Auxiliary Military Policemen, as set forth in Employer's Exhibit No. 11—

Trial Examiner Shroyer: Any objections? No objection. It was admitted.

Q. (By Mr. Pantzer.) Referring to Employer's Exhibit No. 11 I call your attention to the third General Order "to report all violations of orders I am instructed to enforce."

A. That's right.

Q. To whom do you report such violations? What do you do under that order?

A. I would report any violation, any serious violation, to Capt. Wetenhall of Cincinnati.

Q. And who instructs you to enforce orders?

A. It would be the government.

Q. Do you take any orders from Mr. Wood who sits here

in the court room and is the personnel director of E. C. Atkins and Company?

A. Yes, naturally, I work very closely with Mr. Wood, as he is personnel director of the plant and there can be much more efficient guarding of the plant and operation of the plant if we do work closely. I have never taken
64 an order as such from him.

Q. You try to cooperate?

A. I try to cooperate to the best of my ability and he does the same for me.

Q. I note that Order No. 10 directs you to salute all officers and all colors and standards not cased. Is it customary for the Military Police to salute the officers of the Army and Navy?

A. Yes, sir. One of our men got a pretty stiff bawling out for failure to do that several months ago and embarrassed me very much.

Q. From whom?

A. Capt. Wetenhall of the army.

Q. He exacts that salute from the men?

A. Yes, sir. And returns it when he receives it.

Q. Is Capt. Wetenhall a regular army man?

A. Yes.

Q. Of the corps of Military Police?

A. Yes, sir.

Q. And CMP stands for Corps Military Police?

A. Yes, sir, it does.

Q. I now show you Employer's Exhibits 14, 15 and 16 and ask you what, if anything, an Auxiliary Military Police stationed at either of the Atkins plants would have to do with those three kinds of cards. The first card is
65 number what?

(Whereupon, the documents above referred to were marked for identification Employer's Exhibits 14, 15 and 16.)

A. Exhibit No. 14, that's a plain, blank for a picture pass and now used in the Armor Plate Division only. A man cannot come in that particular gate and go to work in that building without showing one of these to the guard on duty. That used to be used over the entire plant, the

same blank. But the badges have been finished for the Saw Division and the badge supplanted this card here for the Saw Division, but is still in effect for the Armor Plate Division.

Q. By badge, you mean the cellulcid badge about 2" in diameter with the employee's picture on it?

A. Yes.

Q. Are those badges worn by the production and Maintenance employees?

A. Yes, sir, they are.

Q. Are those badges worn by the Auxiliary Military Police?

A. No, sir, they are not.

Q. The Auxiliary Military Police wear an emblem on the arm, is that right?

A. Yes, sir.

Q. Which says, "Auxiliary Military Police"—on the left arm?

66 Q. The regulation relating to Military Police being the directive that is in evidence; namely, Exhibit 4, is the one that sets forth the way in which those badges are to be worn. Proceed now and tell me what Employer's Exhibit No. 15 is?

A. Exhibit No. 15 is the red pass which passes an employee of the company who is already in the grounds into the Armor Plate Division. For instance, a man may be on maintenance work and not be attached to that department, but he may have to go in there on business. When that happens, the company issues him the red pass which allow him to go in there and take care of whatever business he has but he cannot go in without showing this red pass to the guard on duty at the door of that particular building. What's Exhibit 15.

Q. What is Employer's Exhibit No. 16?

A. Exhibit 16 is a blank which has two uses: (1) One use of which is when it is used as a gate pass which is good to go in and out of the gate at any time during working hours. It is known as a gate pass. It is not issued to anyone going in unless his business in going in and out of the plant necessitates him having it. For instance, an ex-

ecutive of the plant that goes in and out six or eight times a day does so when he is working, so he would have to have one of these to get in and out of the plant. It is used again—the blank is used with different wording typed
67 in as a temporary gate pass to allow a new employee to go to work who has not yet received his regular picture pass or picture badge. In other words, the same blank is used for two different types of passes with different wording thereon. That is Exhibit 16.

Q. Do you know whether or not the Military Police have any grievance procedure such as unions have?

A. Do you mean within the group?

Q. Yes, suppose that someone disciplines one of the men. What recourse does that man have?

A. He has no recourse at all.

Q. Do the members of the Military Police have seniority rights?

A. No, sir.

Q. What is the fact on that case?

A. Well—

Trial Examiner Shroyer: In regard to lay offs?

Q. (By Mr. Pantzer.) With respect to lay offs, promotions, and so forth?

A. Of course, we haven't had any lay offs but there naturally would be no seniority, entering that I would not think. But in the matter of promotions, efficiency and ability is the only factor that governs. We have men working with us that have been there lots longer than any of our lieutenants at the present time, but the lieutenants
68 who are there, the last three lieutenants that are promoted, but the three lieutenants are not in any respect the oldest guards in the point of seniority. They happen to have been of extra ability, judgment, other qualities.

Q. Upon being promoted to lieutenant, do they obtain greater pay?

A. Yes, sir.

Q. The question of their length of service would be at the Atkins plant and is no criterion whatever?

A. Wouldn't be accepted in the slightest regard, no, sir.

Q. Now, Mr. Gann, when he was on the stand, referred to general orders, which, I take it, are Employer's Exhibits

10, 11, and 12 that I entered into evidence while you were on the stand, Mr. Witness, and also two special orders. What are the special orders?

A. Well, the best way I can describe a special order—most special orders would come from myself.

Q. Are they verbal or written?

A. Well, they are both. Small special orders, nevertheless important enough to be adhered to would be verbal, but a special order which would be a little more complicated or something of that nature would be written down and nailed on the bulletin board in the guards' room and they would read it and follow it.

Q. Do any of the Military Police under your com-
69 mand take any orders from any officer, director, or agent of the Atkins company as such?

A. No, they wouldn't take any orders. Just like myself, they would cooperate in any way they could, but they would only—

Q. Suppose such cooperation involved deviation from such specific order which you had to give. Would they follow your specific order or would they cooperate?

A. They would—that would be their orders—to follow mine, yes, sir.

Q. You would have the same reaction towards such request of cooperation as you would if you had a specific order or a general order to the contrary from one of these superiors, is that right?

A. Yes, sir. In those orders, it says, "No conflicting interest." It means a little different thing there but it means a lot besides. You would follow your Governmental orders first. They would have a much higher priority.

Q. Do you, when you first go on duty, have a formation of any kind, an inspection, a roll call?

A. Not a formal one, no, sir. It would be most informal in our plant. With just nine men you can see who is there at a glance. You wouldn't have to call roll. Inspection is just as quickly done.

Q. Are those guards, when they perform their duty, armed?

70 A. Yes, sir.

Q. With what weapon?

A. With a revolver.

• • • • •

73 Q. What would you do if you found Mr. Wood tampering with machinery or personnel or committing sabotage?

A. Well, in a case like that, I would just turn him
74 in, like anybody else. I would arrest him and turn him in because I am sworn to do that. I have sworn an oath.

Q. Would you do the same with the president of the company?

A. Yes, sir, I would.

Q. And you own no responsibility to the president or any director of the company which would make you violate your oath to the Military?

A. No, sir, there is no reason for that.

Q. You have stated that your pay is on a weekly basis?

A. Yes, sir.

Q. And that consequently you get no overtime for any special service?

A. No, sir.

Q. In that respect you are like a soldier paid on a monthly basis?

A. Yes, sir.

Q. Officer paid on a monthly basis?

A. Yes, sir.

Mr. Pantzer: I think that is all.

Trial Examiner Shroyer: I don't know whether we had 14, 15, and 16 admitted?

Mr. Pantzer: I beg your pardon. I wish to offer 14, 15, and 16.

Trial Examiner Shroyer: Any objection? If not, they are admitted.

• • • • •

75 *Cross-Examination.*

Q. (By Mr. Richardson.) You are the Chief of the Guards?

A. Yes, sir, I am.

Q. In other words, all guards come under your direction?

A. Yes, sir.

Q. You have the right to give them orders? You do give them orders, don't you?

A. Yes, sir, I do.

Q. Do you have the right to recommend them for promotion or discharge? Do you do that?

A. I recommend a man for discharge but I don't discharge him myself.

Q. You have the right to recommend him for discharge?

A. Yes, sir.

Trial Examiner Shroyer: While on the subject, to whom do you recommend?

The Witness: To Capt. Wetenhall, Cincinnati, who does the discharging.

Trial Examiner Shroyer: Who issues these two different types of terminations?

76 The Witness: He does, he issues those.

Trial Examiner Shroyer: Pardon me.

Mr. Richardson: That's all right.

Q. (By Mr. Richardson.) Suppose Mr. Atkins came out and gave you an order. Would you obey that?

A. I never got an order.

Q. If you did, would you obey that order?

A. Well, I wouldn't consider it an order, in the first place. If I could oblige him in any way, without violating federal orders, I would do my best to cooperate with him, but I wouldn't have an order from him in the first place.

Q. Are you paid by check?

A. Yes, sir.

Q. Who signs the check?

A. E. C. Atkins and Company.

Q. What do you mean you are hired by the Government when E. C. Atkins and Company pays you?

A. They pay because the Government makes them pay me.

Q. Have you got any commission in the army?

A. No, not with the Government.

Mr. Richardson: That's all.

Examination by Trial Examiner.

Q. (By Trial Examiner Shroyer.) These four lieutenants—who made them lieutenants?

A. I made three of them myself. One of them was a
77 lieutenant when I came there. He is a very fine man. His work has been satisfactory and I saw no reason to change it.

Q. Whom did you confer with?

A. No one.

Q. You have final authority to do that?

A. Yes, sir.

Q. Without going either through the personnel office or through the Auxiliary Military Police departments?

A. The only thing I did was after I had decided who would be the next lieutenant and furthered that man, made him a lieutenant, myself, in my office, gave him his gold badge and his authority and posted the notice that he was a lieutenant, and then I went to Personnel and advised them that he was the new lieutenant.

Q. He got his increase in pay?

A. Yes.

Q. Who made you the Chief?

A. I don't know. I was hired just like a regular guard with the idea that I would be Chief and after a certain length of time, I became Chief at the Okey of the army and the company.

Q. You are hired at the personnel office to be Chief subject to the approval of the Government?

A. Yes, sir.

78 And of course I am inspected by the army and if they don't like me as being Chief, they can "un-chief" me very fast.

Q. Are all your guards militarized?

A. All but two or three that are brand new men and will be in a week or so.

Trial Examiner Shroyer: That's all.

Redirect Examination.

Q. (By Mr. Pantzer.) In connection with your administrative duties, do you carry on any correspondence with Mr. Wood or any officials of the plant?

A. No, sir.

Q. Do you carry on any correspondence with the Cincinnati office of the Military Police?

A. Yes, sir.

Q. With Captain Wetenhall?

A. Wetenhall's office.

Q. Do you have before you there the file of that correspondence?

A. Yes, sir, I think it is here.

Q. And that file is about one inch thick now?

A. Yes, sir.

Q. And contains onion skin carbon copies of your letters to Wetenhall and original letters from Wetenhall to you?

A. That's right.

Q. About how often do you write him affecting your duties, responsibilities, and requests for instructions from him?

79

A. On an average probably of twice a week, is all.

Q. You ask him both for general orders and for specific instructions?

A. Yes, or I might on a small case instead of writing Capt. Wetenhall, I might talk it over with his assistant, Lt. Scanlon in the City of Indianapolis, who lives here.

Q. That wouldn't require correspondence?

A. No.

Q. You could conduct by telephone too?

A. Yes.

Q. Will you glance through that file and let us know what type of questions you have on occasion taken up with Capt. Wetenhall?

A. Most of these are about men being discharged or hired.

Q. With respect to hiring and discharging?

A. Yes. Asking him for passes to be sent to me that I can have the finger prints and the facts printed in and

things of that nature. Do you want me to read one of these letters?

Q. Yes, if you have a characteristic letter.

A. "Continuous Security District, P. O. Box 1750, Cincinnati, Ohio. Attention: Capt. Wetenhall. Gentlemen: Attached you will find two guards' passes of which the one on Carl Taber is to be cancelled with an honorable
80 discharge. You will note on the second one, which is made out on Garnet J. Williams, that it has not been signed by you. Evidently that was overlooked, so I will appreciate it if you will sign Williams' pass and return it to me. Yours very truly, Henry A. Johnston, Chief of Guards, E. C. Atkins and Company."

Q. If a man is drunk on duty have you the right to discharge that man?

A. I couldn't discharge him legally, no, sir.

Q. Could you suspend him?

A. I would merely suspend him from duty as of the minute I saw him in that condition.

Q. What would be your next step?

A. To sit down and write Capt. Wetenhall a letter and I would recommend his discharge from the Military Police.

Q. Do you recommend discharge to Mr. Wood of the Personnel office?

A. I follow through on that so that the same record—the record will be set straight.

Q. Which one discharges?

A. The Government does the discharging from the Military Police.

Q. Mr. Wood couldn't discharge the man, could he, under these regulations?

A. Not under those regulations.

* * * * *

82 Q. You have been in actually?

A. Have since 1937.

Q. About the time that the CIO organized the production workers, exclusive of saw smiths?

A. That's right.

Q. What two unions do you have at your plant?

A. We have the saw smiths' local union affiliated with

A. F. of L. and U. S. A. Local affiliated with United States Saw Smith Workers of America.

Q. I am going to refer to them as the Saw Smiths' Local and the CIO.

How many employees have you in the Saw Smiths' Local at the present time?

A. 59.

Q. Now there are 59 saw smiths, is that right?

A. That's right.

Q. Do the apprentices to saw smiths attain active membership in the Saw Smiths' Local?

A. No.

Q. Do the brake press operators, which in a sense, do some of the work that the saw smiths do, attain active membership in that Local?

A. No, sir.

Q. But neither the apprentices to saw smiths nor the brake press operators are members of the CIO?

83 A. That's right.

Q. How many of your employees are members of the CIO?

A. As near as I can tell you now, about 1,208.

Q. How many of your employees at the main plant are plant guards or Auxiliary Military Police?

A. Thirty-two.

Q. When you say your employees, they are your employees only in the sense that you pay their wages, is that right?

A. That is correct.

Q. And you make the necessary pay roll deductions?

A. That's right.

Q. How many of those Auxiliary Military Police are stationed at the Fall Creek Ordnance Plant?

A. Thirty.

Q. Now then, have you mentioned now all the persons, the individuals who are occupied either in production work or as Auxiliary Military Police at both those plants?

A. That is correct.

Q. Is the Saw Smiths' Union a closed shop?

A. Yes, it is.
Q. Is the CIO a closed shop union?
A. It's a union shop.
Q. And substantially all the production workers do belong to that?
A. That's correct.
84 Q. All of them?
A. Yes.
Q. Now then, state who is the owner of the plant and improvements at your main plant?
A. E. C. Atkins and Company.
Q. Who is the owner of the land, improvements, machinery, and fixtures at the Fall Creek Ordnance plant?
A. The United States Government.
Q. State in what capacity E. C. Atkins and Company operates that plant?
A. The plant is operated upon a lease.
Q. Lease from the Federal Government?
A. That's correct.
Q. And the terms and conditions of that lease are confidential for military reasons?
A. That is correct.
Q. So that it would be a breach of military confidence to introduce that lease in evidence?
A. That's right.
Mr. Pantzer: We beg, therefore, Mr. Examiner, to be relieved of what would be by me the obligation of producing that lease in evidence and advising what its terms are.
Trial Examiner Shroyer: Surely.
Q. (By Mr. Pantzer.) Is the Fall Creek Ordnance Plant treated by the E. C. Atkins Company in the
85 light of a military reserve?
A. It is.
Q. And is it so treated by the military authorities?
A. It is.
Q. That is not the case with the main plant on Illinois Street?
A. No, sir.
Q. That is a plant which belongs to the Atkins company?

A. That is right. It is listed, however, as a restricted area under government supervision.

Q. I now show you Employer's Exhibit No. 17 and ask you whether that is a photostatic copy of the existing contract between E. C. Atkins and Company and the CIO Local?

(Whereupon, the document above referred to was marked for identification as Employer's Exhibit No. 17.)

A. This is a contract that is now in force, yes.

Mr. Pantzer: I offer Employer's Exhibit No. 17 in evidence.

Trial Examiner Shroyer: Is there any objection?

Mr. Richardson: No.

Trial Examiner Shroyer: There being no objection, it may be admitted.

(Whereupon, the document heretofore marked for identification as EMPLOYER'S EXHIBIT NO. 17 was received in evidence.)

86 Q. I show you Employer's Exhibits No. 18, 19, and 20 and ask you what they are?

(Whereupon, the documents above referred to were marked for identification as Employer's Exhibits No. 18, 19, and 20.)

A. Exhibit No. 18 is our original agreement negotiated as of July, 1940 with the Saw Smiths' Local Union No. 18548, affiliated with the A. F. of L. Exhibit No. 19 is an addendum to the original agreement of July, 1940, entered into between the Saw Smiths' Union and E. C. Atkins and Company to allow the use of other than anvil men on brake presses to straighten armor plate to expedite production of government orders. No. 20 is an addendum that was drawn up at the time of the discussion in regards to the use of brake press operators and shows a period of time over which an experiment was carried out to see whether we could produce the required amount of armor plate without the addition of brake press operators.

Trial Examiner Shroyer: May I ask if the company has any quarrel with the inclusion of the two plants by the union in one unit or whether or not it all goes to the main shops?

Mr. Pantzer: It all goes to the main shops. I want to say this in answer to your question, that at a representation hearing at which both the CIO Local and the Saw Smiths' Local are parties and represented held in
87 January 1 hearing, lasting for four days, the company took the position that the employees of both the main plant and the Fall Creek Ordnance Plant belong to one bargaining unit, a position which was sustained by the Board.

Trial Examiner Shroyer: And the contracts so written?

Mr. Pantzer: The contracts were so written. It would be out position that if the employer is wrong on its main contention, that the National Labor Relations Board does not provide for bargaining between what you might call almost an independent contractor and a labor union, that the employees of both plants belong to one bargaining union. I understand that was also Mr. Richardson's position taken in the very amicable conference we had before Mr. Getreu, the field examiner at the Indianapolis office. That is right, Mr. Richardson?

Mr. Richardson: That is right.

Trial Examiner Shroyer: I didn't want to interrupt you.

Mr. Pantzer: I surely think we should get it in the record.

Trial Examiner Shroyer: Thank you.

Mr. Pantzer: I offer Employer's Exhibits No. 18, 19, and 20.

Trial Examiner Shroyer: If there is no objection, they may be admitted into evidence as Exhibits No. 18, 19, and 20.

* * * * *

91 Q. Those two sets of contracts that I gave you provide for seniority in the case of your regular production-maintenance employees, do they not?

A. That's correct.

Q. And are those rules respecting seniority enforced as to those employees?

A. Oh, yes.

Q. Are they enforced by you with respect to the Auxiliary Military Police?

A. No.

Q. Does the same apply with respect to grievance procedure?

In other words, the grievance procedure is not a part of the discipline of the Auxiliary Military Police? They have their own discipline?

A. That's right.

92 Q. What would you do, Mr. Witness, if one of the Auxiliary Military Police came to you and protested to any action of a disciplinary nature by Chief Johnston?

A. Report that to the proper authorities, in this case to Col. Rasmussen in Cincinnati. He is the man that my office deals with when necessary.

Q. You would take no jurisdiction yourself?

A. No, not without instructions from Col. Rasmussen.

Q. You do, whenever matters of discipline are taken up in your plant get confirmation of any instructions which Col. Rasmussen or Capt. Wetenhall sent to Chief Johnston or to Chief Hann, is that right?

A. That's right.

Q. Do you give any military instruction to your regular employees at the Atkins company?

A. No.

Q. Are they required to salute?

A. No, sir.

Q. Who has the right to discharge the employees?

A. Plant employees?

Q. Plant employees.

A. I do.

Q. You and the foremen?

A. The foremen can recommend the discharge. The actual discharge has to take place through the gen-

93 eral superintendent or myself.

Q. In the CIO contract?

A. Yes, sir. That's right.

Q. I ask you whether anyone other than Auxiliary Military Police down at your plant is entitled to carry an identification card such as is set forth on Employer's Exhibit No. 3?

A. No, only the Auxiliary Military Police are issued these cards.

Q. Are they issued by your office?

A. They are not. They are issued by the Cincinnati office.

Q. With respect to the production employees and the officers, directors and other agents of E. C. Atkins and Company, what kind of an identification card is issued?

A. We have small cards, a card that was early requested by the Ordnance Division to carry a man's photograph, his thumb prints, and a description, a general description.

Q. I show you Employer's Exhibit No. 21 and ask you whether that is a photostatic enlargement of this, your own card?

A. That is correct.

(Whereupon, the document above referred to was marked for identification as Employer's Exhibit No. 21.)

Mr. Pantzer: I offer Employer's Exhibit No. 21 in evidence.

Trial Examiner Shroyer: If there is no objection, it
94 may be admitted.

(Whereupon, the document heretofore marked for identification as EMPLOYER'S EXHIBIT 21, was received in evidence.)

Q. (By Mr. Pantzer.) In addition to the identification card, Employer's Exhibit No. 21, do you and all the other officers, directors and production and maintenance employees of the Atkins company wear identification badges?

A. We do.

Q. About 2" in diameter with your photograph on them?

A. 2" in diameter at the South Street plant and 1½" in the Fall Creek.

• • • • •

95 Q. When they have been recommended, do you know whether or not the military authorities make an independent investigation as to the capacity, integrity, and patriotism of the man whom you have recommended?

A. In the past two years, it has come to my attention, for no statement has been made, that they do, but the re-

port has come back which made it necessary to remove a man on the force.

Q. Is that so that you are satisfied that an independent investigation is made?

A. That's correct.

Q. In addition to what you have learned in the court room today from Chief Johnston?

A. Yes.

98 Trial Examiner Shroyer: That is right.

I believe you also stated at the beginning of the hearing that you wish to renew your motion to dismiss at this time? Do you care to make any additional statement?

Mr. Pantzer: No. May I just by so saying renew that motion without repeating the language—the motion to dismiss which I made at the beginning of the hearing?

Trial Examiner Shroyer: I will allow that and I will refer the motion to the Board.

Is there anything further coming before the Trial Examiner? If there is nothing further, the hearing is closed.

(Whereupon at 5:00 p. m., the hearing was closed.)

BEFORE THE NATIONAL LABOR RELATIONS BOARD.

Ninth Region.

In the Matter of:
E. C. Atkins and Company
and
International Association of Machinists, District 90, and Their Affiliate Local 1683, Affiliated with the American Federation of Labor.
} Case No. 9-C-1982.

Room Number 216.
Federal Building,
Indianapolis, Indiana.
Monday, January 31, 1944.

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock a.m., c.w.t.

Before:

Charles E. Persons, Trial Examiner.

Appearances:

Messrs. Thomas E. Shroyer, and Allen Sinsheimer, Jr., for the National Labor Relations Board, 443 U. S. P. O. and Court House, Cincinnati, Ohio.

Messrs. Kurt F. Pantzer, and Lewis D. Spencer, 1313 Merchants Bank Building, Indianapolis, Indiana, Appearing on behalf of the Respondent.

Messrs. F. M. Richardson, Business Agent, Carl Cedarquist, Grand Lodge Representative, William
2 J. Layton, Business Agent, 49½ South Delaware Street, Indianapolis, Indiana; and

Mr. Van B. Carter, Business Agent, International Association of Machinists, Broadway Hotel, Cincinnati, Ohio,

All appearing on behalf of the International Association of Machinists, District Number 90, and their affiliate Local Lodge 1683.

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4 PROCEEDINGS.

Trial Examiner Persons: This is a formal hearing before the National Labor Relations Board in the matter of E. C. Atkins and Company and International Association of Machinists, District 50 and their affiliate Local 1683, also affiliated with the American Federation of Labor. The case is known in the Board's system of numbering as Number 9-C-1982.

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11 Mr. Pantzer: May I be permitted to interrupt Mr. Sinsheimer in order to present to the Trial Examiner the original copy of an application for subpoena duces tecum directed at Mr. S. M. Richardson, to produce certain union records, a copy of which I have left with Mr. Sinsheimer, and another copy of which I have left with the representatives of the union over here (indicating) at the Union table.

Is your Honor prepared to rule upon the application for subpoena duces tecum at this time?

12 Trial Examiner Persons: Upon first examination, Mr. Pantzer, it appears to me that this subpoena duces tecum is aimed at things which naturally come up in "R" proceedings. Now, I understand we have already had the "R" proceedings in this particular case—am I correct in that?

Mr. Pantzer: Yes, we have had the "R" proceedings.

Mr. Sinsheimer: I would like it to be noted in the record that the Board is objecting to all matters called for in the subpoena duces tecum excepting the Charter and By-laws of the Union and as to those I do not know whether Mr. Pantzer wants those produced or not.

Mr. Pantzer: Well, if the Charter, Constitution and By-laws, as produced at the representation case, may be considered as being in evidence in this case, which I take it will be so stated in the stipulation which Mr. Sinsheimer and I are about to enter, in this case, then there is no need to have a subpoena duces tecum directed at further production of those particular documents and I hereby with-

draw, for the purposes of this record, Item Number 1 of the application just handed to the Trial Examiner entitled "Charter, Constitution and By-laws of the Union".

Mr. Sinsheimer: We will agree that they will be introduced, or agree that they are in this hearing.

Trial Examiner Persons: Were they made a part of the record of the previous proceedings?

13 Mr. Sinsheimer: That is correct.

Trial Examiner Persons: Well, in the event these proceedings should find their way into the Circuit Court, they would become, by the language of the Act itself, a part of the record there.

Mr. Pantzer: That is right.

Mr. Sinsheimer: As to the other matters called for in the subpoena duces tecum, the Board is objecting to.

Mr. Pantzer: May I, Mr. Examiner, have the application marked Respondent's Exhibit Number 1 for the purpose of identification—I am wondering, in order to avoid confusion with the record in the previous case, whether or not we might be permitted to number our exhibits in this case alphabetically, because I do anticipate this case will go to the Circuit Court and it will avoid a great deal of confusion in the matter of like-numbered exhibits?

Trial Examiner Persons: May I ask if a similar request was presented in the "R" proceeding?

Mr. Pantzer: Yes, a similar request was made in the "R" proceeding—the chief difference between the "R" proceedings and this proceeding being the inclusion of the collective bargaining agreements and copies of the grievances and seniority lists referred to in the request and the inclusion of the request and the inclusion of Paragraph F of the reasons for the requests in the present

14 document, those items not having appeared in the application which was submitted in the representation case.

Trial Examiner Persons: The request of the respondent as to the numbering of those exhibits will be at this time denied. I think it might well be a part of the record, but we cannot interfere with the official reporter's instructions as to how these exhibits shall be numbered. That is covered, is it not, Mr. Hise, by your instructions?

The Reporter: Yes, your Honor.

Trial Examiner Persons: It is stipulated between the parties to avoid confusion between the numbering of exhibits in this "C" proceedings and those exhibits previously numbered in the "R" proceeding—that the numbering of the exhibits in the case of both these respondents and the Board, will start with number 100—

Mr. Pantzer: With 101, if you please, sir.

Trial Examiner Persons: Yes, number 101—do you so agree?

Mr. Sinsheimer: We agree to that.

Mr. Pantzer: And we do too. Thank you, your Honor.

(Thereupon, the document above referred to was marked RESPONDENT'S EXHIBIT NO. 101 for identification and received in evidence.)

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24 Mr. Sinsheimer: The Board would like to say this: That the Board does not intend to limit its proof of the facts as to whether or not these are employees, to those eight or nine pages which have just been stipulated to be a part of the record, but the entire testimony at that hearing goes to the question of whether they are, or are not employees of the Respondent.

The Board only—the Board primarily introduced those eight pages for the purpose of establishing the fact that the Union is a labor organization within the meaning of the Act.

Trial Examiner Persons: Thank you, Mr. Pantzer, for your very clear statement.

25 Am I right in understanding that the parties propose to rest upon the testimony presented in the previous "R" proceeding, on this particular issue?

Mr. Sinsheimer: The Board does.

Mr. Pantzer: Yes, we do too.

Trial Examiner Persons: Thank you, gentlemen.

Mr. Pantzer: We should have liked to introduce the additional evidence requested upon the subpoena duces tecum on this point because I can conceive that it has a direct bearing with respect to this union, on the kind of employees which are the plant guards in the E. C. Atkins and Company, but in the absence of that kind of testimony

we shall have to be bound by the record in the preceding case.

Certainly we have no further testimony to offer on the subject.

* * * * *

27 Mr. Sinsheimer: I now offer for identification as Board's Exhibit Number 102, a copy of a proposed agreement between E. C. Atkins and Company, Indianapolis, Indiana, and the International Association of Machinists, District 90, and its affiliated Local Lodge Number 1683.

(Thereupon the document above referred to was marked Board's Exhibit No. 102 for identification.)

28 Mr. Sinsheimer: I would like to call attention at this time to the fact that there is some handwriting on the upper righthand corner of the first page of this document, reading "Exhibit D" which should be crossed off the exhibit as having no relationship to this matter.

Mr. Pantzer: Let the reporter so cross it off?

Trial Examiner Persons: That may be done.

(The reporter complied with instructions of Trial Examiner.)

Trial Examiner Persons: Is that satisfactory to you, Mr. Pantzer?

Mr. Pantzer: I wish to say again, that I can have no objection to this Board's Exhibit Number 102 on the basis of authenticity, or that it was received.

My objection to the introduction of this exhibit in evidence is predicated, of course, upon the Trial Examiner's refusal to grant me the application for a subpoena duces tecum which would have shown, I submit, in the collective bargaining agreement which this Local has with other plants in this town—would have adduced in evidence that certain of the demands in this Board's Exhibit Number 102 were changed by the processes of collective bargaining and that some of them were not; and the extent to which those demands, those demands which were not so changed by collective bargaining, were incompatible with the

29 best interests of the military service.

Trial Examiner Persons: I take it when you say "they were changed" you mean in the other plants that

similar agreements were presented and in process of collective bargaining that they were modified?

Mr. Pantzer: Yes. Now, where you say "were modified", I cannot, of course, say as to that. I assume that bargaining would have had some effect upon the demands and that it certainly would not have been signed verbatim by any employer. I have had no means of finding out wherein those demands were changed in the processes of collective bargaining.

Now, that is my only objection, Mr. Examiner. My objection is not directed to the authenticity of the paper, nor to the fact that it was received.

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RESPONDENT EXHIBIT NO. 1.

UNITED STATES OF AMERICA.

BEFORE THE NATIONAL LABOR RELATIONS BOARD.

Ninth Region.

In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90 and their affiliate, Local 1683, *Petitioner.*	Case No. 9-R-1200.

APPLICATION FOR SUBPOENA DUCES TECUM DIRECTED AT F. M. RICHARDSON TO PRODUCE UNION RECORDS.

Comes now E. C. Atkins and Company, one of the parties to this proceeding, and respectfully applies for a subpoena *duces tecum* directed at F. M. Richardson, Business Representative, International Association of Machinists, District 90, and their affiliate, Local 1683 (hereinafter referred to as the "Union"), one of the parties to this proceeding, to produce the following documents:

1. Charter, Constitution and By-laws of the Union;

2. Minute book, membership roll, application cards, membership cards, dues books, bank book, check book, cancelled checks, correspondence and other records relating to the purposes, activities and membership of said Union; in order that E. C. Atkins and Company may establish (a) the identity of the Union, within the purview of Section 2, subsection (5) of the National Labor Relations Act; (b) whether "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana plants, excluding sergeants, lieutenants, captains and chief," are "employees" within the purview of Section 2, subsection (3) of the National Labor Relations Act; (c) whether "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana plants, excluding sergeants, lieutenants, captains and chief," have "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection," within the purview of Section 7 of the National Labor Relations Act; (d) whether it is an unfair labor practice for E. C. Atkins and Company "to refuse to bargain collectively with the representatives of "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana plants, excluding sergeants, lieutenants, captains and chief," within the purview of Section 8, subsection (5) of the National Labor Relations Act; and (e) whether "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana plants, excluding sergeants, lieutenants, captains and chief," can properly be found to be a "unit appropriate for the purposes of collective bargaining," within the purview of Section 9, subsection (b) of the National Labor Relations Act.

E. C. ATKINS AND COMPANY,
By Kurt F. Pantzer,
Attorney.

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS

AUXILIARY MILITARY POLICE

ARMY OF THE UNITED STATES

IN THE MATTER OF

WITN

Certificate of Enrollment

FULL E. FISHER

This is to Certify that Henry Alma Johnston

has been voluntarily and duly enrolled as an Auxiliary to the Military Police with the rank of _____, for service with the Army of the United States at R. C. Hickox & Company, Indianapolis, Indiana, and is subject to Military Law for the duration of the War or until the earlier official termination by the War Department of his services as an Auxiliary to the Military Police.

For the Commanding General Fifth Service Command

Dated 29 June 1943

E. R. WETENHALL
Lt. C. M. P.
District Field Grade Officer
Civil Service Bldg., Cincinnati, O.

PLACE GRADE OFFICER

143

RESPONDENT EXHIBIT NO. 8.

Cincinnati Office

Aye Eldridge is hereby released from the obligations assumed upon signing agreement as a Civilian Auxiliary to the Military Police at the Fall Creek Ordnance Plant, Indianapolis, Indiana.

By order of the Chief, Cincinnati District Continuous Security Branch.

20 September 1943.

B. R. WETENHALL,
B. R. Wetenhall,
Captain—C. M. P.,
District Plant,
Guard Officer.

THE ARTICLES OF WAR

Appendix 1
TO
A MANUAL
FOR
COURTS-MARTIAL
U. S. ARMY

1928

NATIONAL LABOR RELATIONS BOARD
CASE NO. 2-R-1200 { BOARD / PETITIONER / RESPONDENT } EXHIBIT NO. 9
IN THE MATTER OF E. S. Wilkins & Co
DATE 9-27-43 WITNESS Johnston
ETHEL E. FISHER, OFFICIAL REPORTER
BY [illegible]

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1942

150
170

THE ARTICLES OF WAR

Appendix I

TO

A MANUAL

FOR

COURTS-MARTIAL

U. S. ARMY

1920

Art. 2. Persons Subject to Military Law.—The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law," or "persons subject to military law," whenever used in these articles: Provided, That nothing contained in this act, except as specifically provided in article 2, subparagraph (c), shall be construed to apply to any person under the United States naval jurisdiction unless otherwise specifically provided by law.

(a) All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft, or order to obey the same;

(b) Cadets;

(c) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President: Provided, That an officer or soldier of the Marine Corps when so detached may be tried by military court-martial for an offense committed against the laws for the government of the naval service prior to his detachment, and for an offense committed against these articles he may be tried by a naval court-martial after such detachment ceases;

(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;

(e) All persons under sentence adjudged by courts-martial;

(f) All persons admitted into the Regular Army Soldiers' Home at Washington, District of Columbia.

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F. Punishments.

Art. 41. Cruel and Unusual Punishments Prohibited.—Cruel and unusual punishments of every kind, including flogging, branding, marking, or tattooing on the body, are prohibited.

Art. 42. Places of Confinement—When Lawful.—Except for desertion in time of war, repeated desertion in time of peace, and mutiny, no person shall, under the sentence of a court-martial, be punished by confinement in a penitentiary unless an act or omission of which he is convicted is recognized as an offense of a civil nature and so punishable by penitentiary confinement for more than one year by some statute of the United States, of general application within the continental United States, excepting section 289, Penal Code of the United States, 1910, or by the law of the District of Columbia, or by way of commutation of a death sentence, and unless, also the period of confinement authorized and adjudged by such court-martial is more than one year: Provided, That when a sentence of confinement is adjudged by a court-martial upon conviction of two or more acts or omissions, any one of which is punishable under these articles by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary: Provided further, That penitentiary confinement hereby authorized may be served in any penitentiary directly or indirectly under the jurisdiction of the United States: Provided further, That persons sentenced to dishonorable discharge and to confinement, not in a penitentiary, shall be confined in the United States Disciplinary Barracks or elsewhere as the Secretary of War or the reviewing authority may direct, but not in a penitentiary.

Art. 43. Death Sentence—When Lawful.—No person shall, by general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court-martial present at the time the vote is taken, and for an offense in these articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years,

except by the concurrence of three-fourths of all of the members present at the time the vote is taken. All other convictions and sentences, whether by general or special court-martial, may be determined by a two-thirds vote of those members present at the time the vote is taken. All other questions shall be determined by a majority vote.

* * * * *

B. Desertion; Absence Without Leave.

Art. 58. Desertion.—Any person subject to military law who deserts or attempts to desert the service of the United States shall, if the offense be recommitted in time of war, suffer death or such other punishment as a court-martial may direct, and, if the offense be committed at any other time, any punishment, excepting death, that a court-martial may direct.

* * * * *

Art. 61. Absence Without Leave.—Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper leave, or absents himself from his command, guard, quarters, station, or camp without proper leave, shall be punished as a court-martial may direct.

C. Disrespect; Insubordination; Mutiny.

Art. 62. Disrespect Toward the President, Vice President, Congress, Secretary of War, Governors, Legislatures.—Any officer who uses contemptuous or disrespectful words against the President, Vice President, the Congress of the United States, the Secretary of War, or the governor or legislature of any State, Territory, or other possession of the United States in which he is quartered shall be dismissed from the service or suffer such other punishment as a court-martial may direct. Any other person subject to military law who so offends shall be punished as a court-martial may direct.

Art. 63. Disrespect Toward Superior Officer.—Any person subject to military law who behaves himself with disrespect toward his superior officer shall be punished as a court-martial may direct.

Art. 64. Assaulting or Wilfully Disobeying Superior Officer.—Any person subject to military law who, on any pretense whatsoever, strikes his superior officer or draws or lifts up any weapon or offers any violence against him, being in the execution of his office, or willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct.

Art. 65. Insubordinate Conduct Toward Noncommissioned Officer.—Any soldier who strikes or assaults, or who attempts or threatens to strike or assault, or willfully disobeys the lawful order of a warrant officer or a non-commissioned officer while in the execution of his office, or uses threatening or insulting language or behaves in an insubordinate or disrespectful manner toward a warrant officer or a noncommissioned officer while in the execution of his office, shall be punished as a court-martial may direct.

* * * * *

Art. 68. Quarrels; Frays; Disorders.—All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and noncommissioned officers have power to part and quell all quarrels, frays, and disorders among persons subject to military law and to order officers who take part in the same into arrest, and other persons subject to military law who take part in the same into arrest or confinement, as circumstances may require, until their proper superior officer is acquainted therewith. And whosoever, being so ordered, refuses to obey such officer, nurse, band leader, warrant officer, field clerk, or noncommissioned officer, or draws a weapon upon or otherwise threatens or does violence to him, shall be punished as a court martial may direct.

D. Arrest; Confinement.

Art. 69. Arrest or Confinement.—Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest, as circumstances may require; but when charged with a minor offense only, such person shall not ordinarily

be placed in confinement. Any person placed in arrest under the provisions of this article, shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer or cadet who breaks his arrest or who escapes from confinement, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be dismissed from the service or suffer such other punishment as a court martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be punished as a court-martial may direct.

* * * * *

F. Miscellaneous Crimes and Offenses.

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Art. 85. Drunk on Duty.—Any officer who is found drunk on duty shall, if the offense be committed in time of war, be dismissed from the service and suffer such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall be punished as a court-martial may direct. Any person subject to military law, except an officer, who is found drunk on duty, shall be punished as a court-martial may direct.

Art. 86. Misbehavior of Sentinel.—Any sentinel who is found drunk or sleeping upon his post, or who leaves it before he is regularly relieved, shall, if the offense be committed in time of war, suffer death or such other punishment as a court-martial may direct; and if the offense be committed in time of peace, he shall suffer any punishment, except death, that a court-martial may direct.

* * * * *

Art. 90. Provoking Speeches or Gestures.—No person subject to military law shall use any reproachful or provoking speeches or gestures to another; and any person subject to military law who offends against the provisions of this article shall be punished as a court-martial may direct.

* * * * *

Art. 92. Murder—Rape.—Any person subject to mili-

tary law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

Art. 93. Various Crimes.—Any person subject to military law who commits manslaughter, mayhem, arson, burglary, housebreaking, robbery, larceny, embezzlement, perjury, forgery, sodomy, assault with intent to commit any felony, assault with intent to do bodily harm with a dangerous weapon, instrument, or other thing, or assault with intent to do bodily harm, shall be punished as a court-martial may direct.

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V. Miscellaneous Provisions.

Art. 104. Disciplinary Powers of Commanding Officers.—Under such regulations as the President may prescribe, the commanding officer of any detachment, company, or higher command may, for minor offenses, impose disciplinary punishments upon persons of his command without the intervention of a court-martial, unless the accused demands trial by court-martial.

The disciplinary punishments authorized by this article may include admonition, reprimand, withholding of privileges for not exceeding one week, extra fatigue for not exceeding one week, restriction to certain specified limits for not exceeding one week, and hard labor without confinement for not exceeding one week, but shall not include forfeiture of pay or confinement under guard; except that in time of war or grave public emergency a commanding officer of the grade of brigadier general or of higher grade may, under the provisions of this article, also impose upon an officer of his command below the grade of a major a forfeiture of not more than one-half of such officer's monthly pay for one month. A person punished under authority of this article, who deems his punishment unjust or disproportionate to the offense, may, through the proper channel, appeal to the next superior authority, but may in

the meantime be required to undergo the punishment adjudged. The commanding officer who imposes the punishment, his successor in command, and superior authority shall have power to mitigate or remit any unexecuted portion of the punishment. The imposition and enforcement of disciplinary punishment under authority of this article for any act or omission shall not be a bar to trial by court-martial for a crime or offense growing out of the same act or omission; but the fact that a disciplinary punishment has been enforced may be shown by the accused upon trial, and when so shown shall be considered in determining the measure of punishment to be adjudged in the event of a finding of guilty.

Art. 105. Injuries to Property—Redress of.—Whenever complaint is made to any commanding officer that damage has been done to the property of any person or that his property has been wrongfully taken by persons subject to military law, such complaint shall be investigated by a board consisting of any number of officers from one to three, which board shall be convened by the commanding officer and shall have, for the purpose of such investigation, power to summon witnesses and examine them upon oath or affirmation, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by such board shall be subject to the approval of the commanding officer, and in the amount approved by him shall be stopped against the pay of the offenders. And the order of such commanding officer directing stoppages herein authorized shall be conclusive on any disbursing officer for the payment by him to the injured parties of the stoppages so ordered.

Where the offenders can not be ascertained, but the organization or detachment to which they belong is known, stoppages to the amount of damages inflicted may be made and assessed in such proportion as may be deemed just upon the individual members thereof who are shown to have been present with such organization or detachment at the time the damages complained of were inflicted as determined by the approved findings of the board.

* * * * *

RESPONDENT EXHIBIT NO. 10.

WAR DEPARTMENT
CONTINUOUS SECURITY DISTRICT OFFICE
904 Enquirer Building
Cincinnati, Ohio

10 May 1943

Guard Order)
No. 1)

To: Auxiliary Military Police of this Plant.

1. Pursuant to the orders of the War Department, the guard forces at this plant were activated as Auxiliary Military Police, and for military purposes will be commanded, drilled, and instructed as military units.

2. All members of the guard force are subject to the Articles of War and may be court-martialed or otherwise punished for violations thereof.

3. A commissioned officer of the Army of the United States has been placed in command. Although in command at all times, this officer has not superseded the civilian guard officers and normally will exercise direct control only in matters relating to military instruction and duties as Auxiliary Military Police.

4. The mission of this guard force is to provide protection for this plant. In addition to its normal functions, the force or any member thereof, whether on or off duty, is available for military use in any emergency, whether it be the result of flood, fire, or other disaster; internal disorders hazardous to the plant property or its production; or enemy action of any nature. No conflicting interest of any kind will be permitted to interfere with the successful accomplishment of this mission.

5. The Government of the United States regards the protection of this plan and its production as essential in the successful prosecution of the war. The Auxiliary Military Police are ordered to provide this necessary protection and to ward off danger or threat of danger of any kind and from any source. If force must be used to ac-

complish this result, it will be used only to the extent reasonably necessary.

6. No member of the Auxiliary Military Police may resign without the written approval of the District Plant Guard Officer. Inattention to duty, failure to attend required instruction periods, and conduct unbecoming to the service may be cause for dismissal and the denial of a Certificate of Meritorious conduct.

For the Commanding Officer:

B. R. Wetenhall
Captain, C. M. P.
District Plant Guard Officer.

Approved,
Signed .....
Name in Type
Title
Plant

CIPP 68

Production Must Not Be Interrupted

RESPONDENT EXHIBIT NO. 11.

WAR DEPARTMENT
CONTINUOUS SECURITY DISTRICT OFFICE
904 Enquirer Building
Cincinnati, Ohio

11 May 1943

Guard Order)
No. 2)

1. General Orders. General Orders are those orders which apply to all posts. All Auxiliary Military Police members of plant guard forces are required to thoroughly understand the following listed General Orders.

2. When directed by proper authority to recite his General Orders a member of the Auxiliary Military Police replies substantially as follows:

My General Orders are:

(1) To take charge of this post and all plant and government property in view.

(2) To walk my post in a military manner, keeping always on the alert and observing everything that takes place within sight or hearing.

(3) To report all violations of orders I am instructed to enforce.

(4) To repeat all calls from posts more distant from the guardhouse than my own.

(5) To quit my post only when properly relieved.

(6) To receive, obey, and pass onto the guard who relieves me all orders from the plant official in charge of the Plant Guard Force, the Chief and non-commissioned officers of the guard.

(7) To talk to no one except in the line of duty.

(8) To give the alarm in case of fire or disorder.

(9) To call the Chief of the Guard in any case not covered by instructions.

(10) To salute all officers and all colors and standards not cased.

(11) To be especially watchful at night and during the time for challenging to challenge all persons on or near my post, and to allow no one to pass without proper authority.

(12) To allow no one to commit a nuisance on or near my post.

(13) To allow no one to enter upon plant property without proper authority.

(14) To detain all persons attempting to take photographs or make maps or sketches of the plant property without proper authority.

(15) To give no information concerning the plant or its business to anyone.

(16) To give first aid where necessary, and to direct injured persons, who can walk, to aid stations.

(17) To assist authorized persons to locate an area or gate or office to which they have been directed by proper authority.

(18) To allow no one to loiter on or near my post or the plant premises, and to detain all suspicious persons and call the Chief of the Guard.

By order of the Commanding Officer:

B. R. Wetenhall
Capt., C. M. P.
District Plant Guard Officer

Approved,
Signed .....
Type Name—
Title
Plant

CIPP 52

Production Must Not Be Interrupted

RESPONDENT EXHIBIT NO. 12

(Letterhead of Continuous Security District Office, Cincinnati, Ohio.)

12 May 1943.

Guard Order
No. 3

To All Auxiliary Military Police

1. Each member of the Auxiliary Military Police is authorized to wear a service stripe for each six (6) months of service faithfully performed.

2. Service will begin with the date that the plant guard was inducted into the Auxiliary Military Police.

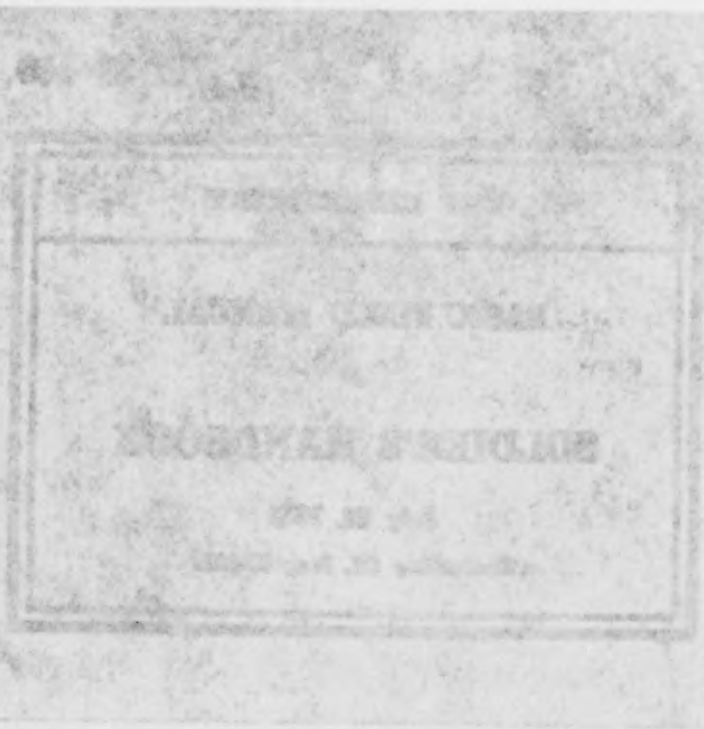
3. The service stripe will be in accordance with Army Regulations and will conform in material and color to the chevrons authorized to be worn by the Auxiliary Military Police in the Fifth Service Command.

4. The service stripe will not be furnished at government expense.

For the Commanding Officer:

B. R. Wetenhall,
Capt., CMP
District Plant Guard Officer.

Approved,
Signed Harold L. Schuman.
Type Name
Title
Plant



RESPONDENT EXHIBIT NO. 13.

190. While you are off duty do not remove your clothing or equipment or leave the immediate vicinity of the guardhouse without permission of the commander of the guard. An emergency may occur when you will be needed at once.

191. When you are not posted as a sentinel or on other duty which requires you to carry your rifle, keep it in the arms rack in the guardhouse or in a stack.

192. Orders for sentinels are of two classes: general orders and special orders. *General orders* apply to all sentinels. *Special orders* apply to particular posts and duties. You must know and be able to recite the general orders before you go on guard duty. As soon as you are assigned to a relief and a particular post you must also learn and be able to recite the special orders for that post. Whenever the officer of the day or the commander of the guard considers that a sentinel does not have sufficient instruction or is otherwise unfit for guard duty, he relieves him, sends him back to his organization, and notifies his organization commander.

193. The following are the general orders all sentinels are required to memorize. Learn them as soon as you can.

My general orders are—

1. *To take charge of this post and all Government property in view.*

2. *To walk my post in a military manner, keeping always on the alert and observing everything that takes place within sight or hearing.*

3. *To report all violations of orders I am instructed to enforce.*

4. *To repeat all calls from posts more distant from the guardhouse than my own.*

5. *To quit my post only when properly relieved.*

6. *To receive, obey, and pass on to the sentinel who relieves me all orders from the commanding officer, officer*

of the day, and officers and noncommissioned officers of the guard only.

7. *To talk to no one except in line of duty.*

8. *To give the alarm in case of fire or disorder.*

9. *To call the corporal of the guard in any case not covered by instructions.*

10. *To salute all officers and all colors and standards not cased.*

11. *To be especially watchful at night and, during the time for challenging, to challenge all persons on or near my post, and to allow no one to pass without proper authority.*

194. Guard duty is one of your most important duties. Remember that when you are posted as a sentinel you represent the commanding officer whose orders you are required to enforce, on and in the vicinity of your post. Upon the manner in which you perform your duties depends not only the enforcement of military law and orders, but also the security of persons and property under your charge. In time of war your responsibility as a member of the guard is greater than ever, for then the safety of your organization depends upon the manner in which you watch while your comrades rest. This is so important that sleeping on post by a sentinel or other improper performances of duty is punishable by a very severe court-martial sentence.

RESPONDENT EXHIBIT NO. 17.

Exhibit A.

Collective Bargaining Agreement
Executed by and Between

E. C. Atkins and Company

and

United Steelworkers of America, Local No. 1543
Affiliated with the C. I. O.

This Agreement, Dated and effective June 14, 1943, but actually executed June 14, 1943, by and between E. C. Atkins and Company, an Indiana corporation (hereinafter referred to as the "Employer"), Party of the First Part, and United Steelworkers of America, Local No. 1543, Affiliated with the C. I. O. (hereinafter referred to as the "Union"), Party of the Second Part,

Witnesseth That:

Whereas, the Employer and the Union have negotiated the terms and conditions of a Collective Bargaining Agreement, and desire to reduce the same to writing:

Now, Therefore, The parties hereto enter into the following Articles of Agreement:

Section 1—Bargaining Unit, Recognition and Co-operation

(a) Bargaining Unit. It is hereby agreed that the unit appropriate for the purposes of collective bargaining, pursuant to the provisions of Section 9 (b) of the National Labor Relations Act, is the unit consisting of all persons employed in the plants, shops, or yards of the Employer, except foremen and other supervisory officials, timekeepers and checkers, plant protection employees, journeymen sawsmiths, apprentice sawsmiths, and brake press operators, painters, carpenters and confidential salaried employees, including the South Illinois Street Plant and Fall Creek Ordnance Plant at Indianapolis, Indiana, and the Portland, Oregon, and Seattle, Washington, Plants, as established by the Decision and Direction of Election of the National Labor Relations Board, entered

March 10, 1943, in a certain proceeding entitled "In the Matter of E. C. Atkins & Company and United Steelworkers of America, Local 1543, Affiliated with the C. I. O.," being Case No. R-4820, upon the docket of such Board, as affected and amended by supplements to such Decision entered March ....., 1943 and April 15, 1943, such unit being hereinafter referred to as the "Appropriate Bargaining Unit." The term "employee," as used in this Agreement, shall include each and every member of the Appropriate Bargaining Unit.

(b) Designation of Union. The collective bargaining negotiations between the Union and the Employer resulting in the negotiation and execution of this Collective Bargaining Agreement are conducted pursuant to the Decision of the National Labor Relations Board, as amended and supplemented, hereinabove referred to.

(c) Recognition. The Employer hereby recognizes the Union as the Exclusive collective bargaining agency for all members of the Appropriate Bargaining Unit in respect to rates of pay, wages, hours of employment, or other conditions of employment; provided that any employee in such Appropriate Bargaining Unit shall have the right at any time to present grievances to the Employer. The Union and its Negotiating Committee, in conducting the negotiations resulting in the execution of this Collective Bargaining Agreement, hereby represent and warrant to the Employer that they have acted, and are acting, pursuant to the authority conferred as the exclusive collective bargaining agency for and in behalf of all members of the Appropriate Bargaining Unit, and with the intent that all members of the Appropriate Bargaining Unit shall be bound by all the terms of this Collective Bargaining Agreement.

(d) Co-operation. It is the intent and purpose of the parties to this Agreement to promote and improve industrial and economic relationships between the employees and the Employer, and to set forth herein the basic agreement governing rates of pay, wages, hours of employment, or other conditions of employment.

Section 2—Union Shop

All employees eligible shall become members of the Union within thirty (30) days after employment. The Employer shall have the exclusive right to determine the source or sources of applicants for employment, and shall be the sole judge of the requirements and qualifications of such applicants.

• • • • •

RESPONDENT EXHIBIT NO. 18.

Agreement

Section 1.

This Agreement entered into this first (1) day of July 1940 by and between E. C. Atkins & Co., hereinafter referred to as the Employer, and Saw Smiths' Local Union No. 18548, known as Anvil Men, affiliated with the American Federation of Labor, hereinafter referred to as the Union, representing all Employes in Indianapolis who are Anvil Men.

Section 2.

The Employer agrees to employ only Saw Smiths in good standing with the Union, and the Union agrees to furnish the Employer with a sufficient number of competent workers (if available) whenever called upon to do so. This Union Recognized as Federal Labor Union No. 18548 reserves the right to accept or reject any journeymen anvilman. In case of rejection this Union can reserve the right not to work with him.

Section 3.

One Dollar ($1.00) an hour shall constitute the minimum rate of wages for any one hour's day work or piece work. Where existing wage rates are paid the Employe in excess of the scale herein provided, said scale shall remain at the highest rate and nothing herein contained shall be construed to permit reduction in such higher rate of pay.

Section 4.

Eight (8) hour's shall constitute a day's work and forty (40) hour's shall constitute a week's work, with time and

one-half for all time worked in excess of these hour's. All work done on Saturday shall be considered overtime. Double time for all work done on Sunday and all legal holidays.

Section 5.

Each apprentice now working shall be required to serve four (4) years on the anvil at day work, and in no way will he be considered a journeyman until he has completed his specified four (4) years. He shall at no time be given preference over a journeyman. There shall be no apprentices put on the anvil during the life of this contract.

Section 6.

There shall be no discrimination against age or ability. In event there is, it shall be referred to the grievance committee.

Section 7.

Each Anvil man, after having served one (1) year of accumulated service with E. C. Atkins & Co., shall receive one week's vacation with pay.

Section 8.

This Agreement, shall be and remain in full force and effect from this date, until one (1) year from date of signing of this contract, and shall continue in effect annually thereafter, unless thirty (30) day's notice in writing is submitted prior to the expiration of this agreement, of any desire to change or amend same. It is agreed, however, that this contract may be opened at the request of the Union, thirty days after the signing of this agreement for the question of wages.

E. C. Atkins and Company
Henry C. Atkins, Jr.,
Supt.

Saw Smith's Federal Labor Union
No. 18548
President Chas Schafer, Jr.
Secretary Eddie Vespo
Treasurer Henry H. Lott

American Federation of Labor
Hugh Gormley,
Gen. Representative.

THIS IDENTIFIES

Cyrus Elvin Wood — NAME

Personnel — BADGE NO.

AS AN EMPLOYEE OF

E. C. ATKINS AND COMPANY

INDIANAPOLIS, INDIANA

FALLCREEK ORDNANCE PLANT

Cyrus E. Wood

PERSONNEL DIRECTOR

This Card Must Be Surrendered Upon Termination of Employment

DATE EMPLOYED October 6, 1[illegible]

AGE	WEIGHT	HEIGHT	EYES	HAIR
51	195	6'	BR	Gray

FINGERPRINT LEFT INDEX

FINGERPRINT RIGHT INDEX

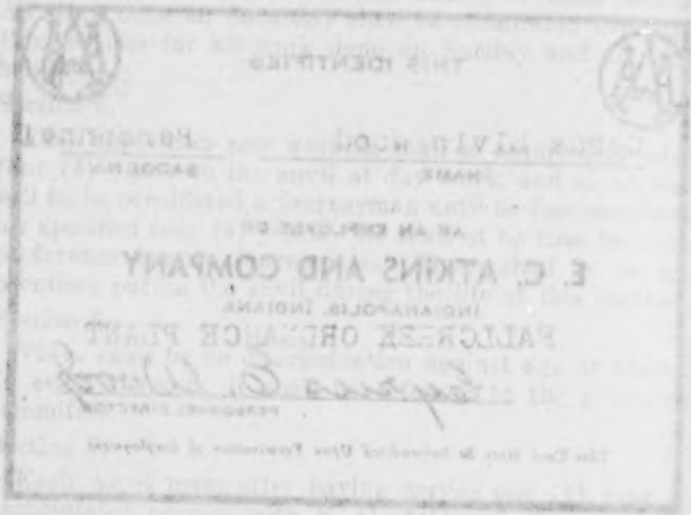
NATIONAL LABOR RELATIONS BOARD

CASE NO. 7-R-120 | EXHIBIT NO. 21

IN THE MATTER OF E. C. Atkins Co

DATE 7-24-44 WITNESS

[illegible]



RESPONDENT EXHIBIT NO. 101.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Ninth Region

In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90, and Their Affiliate Local 1683, Affiliated With the American Federation of Labor.	Case No. 9-C-1982.

APPLICATION FOR SUBPOENA DUCES TECUM DIRECTED AT F. M. RICHARDSON TO PRODUCE UNION RECORDS.

Comes now E. C. Atkins and Company, one of the parties to this proceeding, and respectfully applies for a subpoena duces tecum directed at F. M. Richardson, Business Representative, International Association of Machinists, District 90, and their affiliate Local 1683 (hereinafter referred to as the "Union"), one of the parties to this proceeding, to produce the following documents:

1. Charter, Constitution and By-laws of the Union;

2. Minute book; membership roll; application cards; membership cards; dues books; bank book; check book; cancelled checks; collective bargaining agreements executed by and between the Union with other plants in the Indianapolis area covering the plant guards on duty at such plants; copies of grievances filed under such collective bargaining agreements, records of the hearings arising under the same, and decisions made with respect to such grievances by the Union and the respective employer, or the umpire, in the case; copies of seniority lists posted under such

collective bargaining agreements; copies of orders affecting the wages, discipline, disputes, etc. arising in said various plants, as rendered by the National Labor Relations Board, the National War Labor Board, and the various trial examiners and subsidiary tribunals; correspondence; and other records relating to the purposes, activities and membership of said Union;

in order that E. C. Atkins and Company may establish (a) the identity of the Union, within the purview of Section 2, subsection (5) of the National Labor Relations Act; (b) whether "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana plants, excluding sergeants, lieutenants, captains and chief," are "employees" within the purview of Section 2, subsection (3) of the National Labor Relations Act; (c) whether "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana plants, excluding sergeants, lieutenants, captains and chief," have "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection," within the purview of Section 7 of the National Labor Relations Act; (d) whether it is an unfair labor practice for E. C. Atkins and Company "to refuse to bargain collectively with the representatives of "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana plants, excluding sergeants, lieutenants, captains and chief," within the purview of Section 8, subsection (5) of the National Labor Relations Act; (e) whether "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana plants, excluding sergeants, lieutenants, captains and chief," can properly be found to be a "unit appropriate for the purposes of collective bargaining" with E. C. Atkins and Company, within the purview of Section 9, subsection (b) of the National Labor Relations Act; and (f) whether the provisions of the collective bargaining agreements, statements of grievance, seniority

ists, and orders entered by the National Labor Relations Board and National War Labor Board, covering the units of "plant guards" subject to organization by the Union at other plants in the Indianapolis area do not contain provisions which are incompatible with the service of the auxiliary military police at the plants of E. C. Atkins and Company in the military service.

E. C. Atkins and Company
By Kurt F. Pantzer,
Attorney.

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IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

National Labor Relations Board,
Petitioner,
vs.
E. C. Atkins and Company,
Respondent.
} Case No. 8669.

MOTION OF RESPONDENT, E. C. ATKINS AND COMPANY, TO REQUIRE PETITIONER TO CONFORM APPENDIX AND BRIEF TO THE RULES OF THIS COURT.

Comes now E. C. Atkins and Company, the Respondent in this cause, and in support of its motion to require Petitioner to conform Appendix and Brief to the Rules of this Court, alleges:

1. That the "Appendix to Petitioner's Brief," filed in this cause on September 6, 1944, fails to comply with Rule 35, Section 4, clause (c), of this Court, requiring the Petitioner to "print as a part of the appendix to his brief the pleadings, together with the findings of fact, conclusions of law, order and opinion of the board," in that such Appendix fails to set forth the "Statement of Exceptions to Intermediate Report, Record, and Proceedings," executed by the Respondent on March 6, 1944, and filed in this cause on March 8, 1944, consisting of fourteen typewritten pages.

(a) Section 32 of the Rules and Regulations Series 3 of the National Labor Relations Board, effective November 26, 1943 (before February 19, 1944, the date of the Intermediate Report rendered by Trial Examiner Persons herein), provides as follows:

"Sec. 32. *Intermediate Report; contents; service; transfer of case to Board.*—After a hearing for the purpose of taking evidence upon a complaint, the Trial Examiner shall prepare an Intermediate Report * * *."

(b) Section 33 of the Rules and Regulations Series 3 of the National Labor Relations Board, effective November 26, 1943, provides as follows:

"Sec. 33. *Exceptions; time for filing; where to file; service on parties; extension of time; effect of failure to include matter in exception.*—Within fifteen days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of this Article, any party or counsel for the Board may file with the Board at Washington, D. C., an original and four copies of a statement in writing setting forth such Exceptions to the Intermediate Report or to any other part of the record or proceeding (included rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. * * *"

(c) Section 35 of the Rules and Regulations Series 3 of the National Labor Relations Board, effective November 26, 1943, provides as follows:

"Sec. 35. *Action of Board upon expiration of time to file Exceptions to Intermediate Report; oral arguments before and filing of briefs with Board; action of Board where Trial Examiner finds no unfair labor practices and no Exceptions filed; reopening of record.*—Upon the expiration of the period for filing a statement of Exceptions and brief, as provided in Section 33 of this Article, the Board may decide the matter forthwith upon the record, or after oral argument, or may reopen the record and receive further evidence before a member of the Board or other agent or agency, or may close the case upon the compliance with the recommendations of the Intermediate Report, or may make other disposition of the case. * * *"

(d) The "Statement of Exceptions to Intermediate Report, Record, and Proceedings," executed by the Respondent on March 6, 1944, and filed in this cause on March 8, 1944, is, in the opinion of the Respondent, a pleading absolutely essential to the record of this case in this Court.

2. That the "Brief for the National Labor Relations Board," filed in this cause on September 18, 1944, fails to comply with Rule 35, Section 5, and Rule 16, Section 4, of this Court, requiring the statement of facts to show the pages of the transcript of the record, in which the "War Department Regulations providing for the Activation of Auxiliary Military Police Units," set forth as an "Addendum" at pages 20 to 44, both inclusive, of such Brief (hereinafter referred to as the "War Department Regulations"), appear.

(a) The War Department Regulations were never offered or admitted in evidence in this case and do not constitute a part of the "Transcript of the Record filed in this Court," referred to in Rules 34 and 35.

(b) The War Department Regulations are the principal basis of the arguments set forth in points A. and B. of the Petitioner's Brief (see all references marked "*infra*" on pages 8 to 12, both inclusive, of such Brief).

(c) At the hearing held September 24, 1943, the only military orders offered in evidence to show the relationship between the plant guards and the War Department were Guard Order No. 1, dated May 10, 1943 (Respondent's Exhibit No. 10); Guard Order No. 2, dated May 11, 1943 (Respondent's Exhibit No. 11); and Guard Order No. 3, dated May 12, 1943 (Respondent's Exhibit No. 12), all issued by the Continuous Security District Office of the War Department, at Cincinnati, Ohio, and issued over the signature of B. R. Witenhall, Captain C. M. P. District Plant Guard Officer, and letter under date of June 7, 1943 (Respondent's Exhibit No. 4), issued over the signature of A. C. Rasmussen, Lt. Col., Ord. Dept. District Chief. All the issues herein, both in the representation proceedings and the unfair labor practice proceeding, were tried upon the assumption that the said Respondent's Exhibits Nos. 10, 11, 12, and 4, were the sole written exhibits setting forth the military orders showing the relationship between the plant Guards and the War Department.

(d) No request was either made or granted in the

representation case or at the hearing in the unfair labor practice case to take judicial notice of the terms and conditions of the War Department Regulations.

(e) The War Department Regulations are not such a document as this Court may take judicial notice of at the argument, or in rendering its decision herein.

(f) If the War Department Regulations are permitted to be the basis of Petitioner's case herein, they substantially change the theory of such case and the evidence upon which it is based. It is, therefore, imperative for the Respondent to know in advance of writing Respondent's brief whether or not the War Department Regulations are properly before this Court.

Wherefore, the Respondent prays this Court that it order the Petitioner to do the following:

1. Supplement the "Appendix to Petitioner's Brief" by setting forth therein the "Statement of Exceptions to Intermediate Report, Record and Proceedings," executed by the Respondent on March 6, 1944, and filed in this cause on March 8, 1944.

2. Strike out from the "Brief for the National Labor Relations Board" the War Department Regulations set forth as an Addendum at pages 20-44 thereof, and all references to such addendum contained in such Brief.

Barnes, Hickam, Pantzer & Boyd,
By Kurt Pantzer,
Attorneys for Respondent.

Filed Sept. 26, 1944.

MEMORANDUM OF NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO RESPONDENT'S MOTION TO REQUIRE THE BOARD TO SUPPLEMENT ITS APPENDIX AND TO STRIKE CERTAIN PORTIONS OF ITS BRIEF.

I.

With respect to respondent's motion that the Board be required to supplement the appendix to its brief by setting forth respondent's "Statement of Exceptions to Inter-

mediate Report, Record, and Proceedings" dated March 6, 1944, the Board desires to inform the Court that the Board, by letter dated September 28, 1944, authorized the printer to prepare a supplemental appendix containing this document, which the Board inadvertently failed to designate for printing in the Designation heretofore filed herein.

II.

Respondent's motion that the Board be required to strike from its brief the War Department Regulations providing for the Activation of Auxiliary Military Police Units, dated March 17, 1943, which the Board included as an addendum to its brief, should be denied for the following reasons. The Regulations in question were promulgated by the War Department pursuant to the authorization contained in Executive Order No. 8972 dated December 12, 1941, issued by the President in the exercise of his constitutional authority as Commander in Chief of the Army and Navy of the United States for the purpose of affording protection of national defense material, premises, and utilities from injury or destruction. It is well settled that such regulations, like regulations of executive officers of the government issued in the exercise of their statutory functions, have the force and effect of law. *United States* v. *Grimaud*, 220 U. S. 506, 520-523; *United States* v. *Morehead*, 243 U. S. 607, 613-616; *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 349; *Lilly* v. *Grand Trunk R. Co.*, 317 U. S. 481, 488. Having such effect, the regulations in question, even though not formally introduced into evidence, may be judicially noticed by this Court just as decisions of the courts and administrative agencies and acts of Congress are judicially noticed and considered. *Caha* v. *United States*, 152 U. S. 211, 221-222; *Lilly* v. *Grand Trunk R. Co.*, 317 U. S. 481, 488; *Givens* v. *Zerbst*, 255 U. S. 11, 18.

Having the force and effect of law, the Board may rely on these Regulations in its argument to this Court and the Court may take notice thereof and consider them, irrespective of the fact that respondent was not specifically put

upon notice at the hearings before the Board as to the scope of the Board's argument to be presented in this Court. Respondent is presumed to be familiar with the basic authority underlying Lt. Col. Rasmussen's action in issuing the letter of June 7, 1943, which assertedly governed the militarization of respondent's plant guard forces. As the Supreme Court has held, "those dealing with an agent of the United States must be held to have had notice of the limitations of his authority." *Wilber National Bank* v. *United States*, 294 U. S. 120, 123-124; *Sutton* v. *United States*, 256 U. S. 575, 579; *Whiteside* v. *United States*, 93 U. S. 247, 256-257.

Moreover, Lt. Col. Rasmussen's letter of June 7, 1943, which respondent introduced in evidence, referred to the action of the Secretary of War in directing the military organization of plant guard forces as Auxiliary Military Police (B. A. 58-58i, par. 1). Thus respondent was put upon notice of the existence of the underlying authority for Lt. Col. Rasmussen's action in issuing the letter of June 7, 1943, concerning the militarization of civilian guard forces. In these circumstances, particularly, respondent may not validly claim that it was taken by surprise by the Board's reliance in this Court upon the basic War Department Regulations governing the militarization of civilian guard forces.

Wherefore, the National Labor Relations Board, petitioner herein, prays that respondent's motion to require the Board to strike said War Department Regulations from its brief herein be denied forthwith, or in the alternative, that the Court reserve its decision on said motion pending its consideration of this cause on the merits.

Respectfully submitted,

Malcolm F. Halliday,

Associate General Counsel, National Labor Relations Board.

Dated: September 30, 1944.

Filed October 2, 1944.

REPLY OF RESPONDENT, E. C. ATKINS AND COMPANY, TO ANSWER MEMORANDUM OF PETITIONER RESPECTING MOTION OF RESPONDENT TO REQUIRE PETITIONER TO STRIKE ADDENDUM, AND ALL REFERENCES TO ADDENDUM, FROM PETITIONER'S BRIEF.

Comes now E. C. Atkins and Company, the Respondent in this cause, and for reply to the Answer Memorandum of the Petitioner respecting the Motion of Respondent to require the Petitioner to strike the Addendum, and all references to the Addendum, from the Petitioner's Brief, alleges:

1. The "Addendum," which, together with references thereto, the Respondent has moved to be stricken from Petitioner's Brief, is Circular No. 15, dated March 17, 1943, issued by the Headquarters, Army Service Forces, Washington, D. C., relating to "Auxiliary Military Police." In Respondent's Motion, and in this Reply, such Circular is referred to as the "War Department Regulations."

The Petitioner's Memorandum advises that the War Department Regulations "were promulgated by the War Department pursuant to the authorization contained in Executive Order No. 8972 dated December 12, 1941, issued by the President in the exercise of his constitutional authority as Commander in Chief of the Army and Navy of the United States for the purpose of affording protection of national defense material, premises, and utilities from injury or destruction."

The Respondent denies that the War Department Regulations were promulgated by the War Department, as is perfectly obvious upon perusal thereof. In this sense, both the use of the words "War Department" by the Petitioner and the citation of the cases of the Petitioner are a trifle loose and inaccurate. The Respondent admits that Executive Order No. 8972, dated December 12, 1941, was issued by the President. Executive Order No. 8972, dated December 12, 1941, of which this Court is *required* to take judicial notice pursuant to the provisions of Sections 304, 305 and

307 of the Federal Register Act (U. S. C. A. 44, § 301 ff. July 26, 1935) reads as follows:

"Executive Order 8972

Authorizing The Secretary Of War And The Secretary Of The Navy To Establish And Maintain Military Guard And Patrols, And To Take Other Appropriate Measures, To Protect Certain National-Defense Material, Premises, And Utilities From Injury Or Destruction.

Whereas the United States is now at war; and

Whereas there exists a serious and immediate potential danger of sabotage to national-defense material, national-defense premises, and national-defense utilities which may menace our maximum productive effort; and

Whereas the Congress of the United States has in recent enactments recognized this danger by enjoining efforts to injure, interfere with, or obstruct the national defense, and providing severe penalties therefor; and

Whereas it is considered necessary in the interests of national defense that, in particular situations where hazardous, dangerous, or other unfavorable conditions may from time to time exist, special precautionary measures be taken by establishing and maintaining military guards and patrols or other appropriate means to protect from injury or destruction national-defense material, national-defense premises, and national-defense utilities:

Now, Therefore, by virtue of the authority vested in me as President of the United States, and Commander-in-Chief of the Army and Navy of the United States, I hereby authorize and direct the *Secretary of War, whenever he deems such action to be necessary or desirable,* and the Secretary of the Navy, whenever he deemes such action to be necessary or desirable, to establish and maintain military guards and patrols, and to take other appropriate measures, to protect from injury or destruction national-defense material,

national-defense premises, and national-defense utilities, as defined in the act of April 20, 1918, 40 Stat. 533, as amended by the act of November 30, 1940, 54 Stat. 1220, and the act of August 21, 1941, 55 Stat. 655.

This order shall not be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, Department of Justice, with respect to the investigation of alleged acts of sabotage.

Franklin D. Roosevelt

The White House
December 12, 1941." (Emphasis Ours)

One of the principal purposes of the Federal Register Act was to make available, *for the purpose of constructive notice and judicial notice,* the fast multiplying Executive Orders, Directives, Regulations, etc., which the Federal Government is promulgating. It would seem to be safe and fair to the average citizen to assume that he need not take constructive notice of any other documents. Certainly, that clause of Section 307 of the Federal Register Act, which provides that "unless otherwise specifically provided by statute, such filing of any document, required or authorized to be published under § 305 of this chapter, shall, except in cases where notice by publication is insufficient in law be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby," does not affirmatively apply to the War Department Regulations upon which the Petitioner at this late date now desires to base its case.

The six cases cited by the Petitioner in its Brief are all cases in which a statute expressly directed the head of an Executive Department, or Administrative Department, such as the Secretary of War, personally, or the Interstate Commerce Commission, to promulgate rules and regulations in the first instance, or to approve them as promulgated after they have been prepared by a subordinate officer or bureau. In not one of the cases is a regulation, not promulgated under the hand of the head of the Executive Department, or by order of the Administrative Tribunal concerned, given statutory effect or judicially noticed.

It is to be kept in mind that in the instant case, the Petitioner is seeking an Enforcement Order or Injunction against the Respondent upon the theory that the Respondent was guilty of an Unfair Labor Practice by virtue of having refused to obey the War Department Regulations referred to. These War Department Regulations were neither introduced in evidence nor referred to at any one of the following occasions in which this matter has been in controversy:

1. The hearing on the representation petition.
2. The Decision and Order on the representation petition.
3. The hearing in the Unfair Labor Practice Case.
4. The Intermediate Report in the Unfair Labor Practice Case.
5. The argument in Washington before the National Labor Relations Board in the Unfair Labor Practice Case.
6. The Final Decision and Order in the Unfair Labor Practice Case.

Neither is Executive Order No. 8972, dated December 12, 1941 and issued by the President, *or* the War Department Regulations, referred to in any way, shape or form in the "Petition for Enforcement of an Order of the National Labor Relations Board," executed August 24, 1944, which is now pending before this Court. (Appendix to Petitioner's Brief, pp. 1 to 4.)

Although the decision in *Nagle* v. *United States*, 145 Fed. 302 (CCA 2 (1906)) has probably been overruled if the rules and regulations therein referred to were issued over the signature of the Postmaster General (the head of a Federal Executive Department), common sense of the decision is doubtless still good, and is consequently here quoted for the purpose:

> "Reference is made to the regulations of the post office, and some sections thereof are printed in the brief, but none of them are set forth in the record. The decisions of the Supreme Court on the subject of judicial notice of such rules and regulations are not entirely uniform. *Caha* v. *U. S.*, 152 U. S. 221, 14 Sup.

Ct. 513, 38 L. Ed. 415; *The E. A. Packer*, 140 U. S. 367, 11 Sup. Ct. 794, 35 L. Ed. 453. Where there is some question of statute law, where the court can itself by reference to books with which it is familiar, and which each judge possesses, determine just what statutory provisions were in force at a given date, there is no necessity for incumbering the record with them. But it is different with departmental regulations. No department ever sends its compilation of regulations to the judges. They are frequently amended, and, without special information from the department, no one can tell whether a particular regulation in some printed compilation was in force a year later. It is grossly unfair to a trial judge to cite some regulation upon a brief on appeal which was not laid before him on the trial. We have no doubt that it is far better practice to read any special regulations which may be relied upon into the record before the trial court. It is a hopeless task for an appellate court to determine what such regulations were at any particular time. It must either accept counsel's statement, or itself make inquiry of the particular department; neither of which practices is to be commended. It is to be hoped that upon the new trial the various regulations bearing upon the questions presented by the case may be specifically referred to."

The Respondent again shows that in order properly to analyze the Petitioner's case on this appeal, and further to prepare Respondent's Brief, the decision of this Court should be made prior to the preparation and filing of such Brief, and not be kept pending the consideration of this cause by this Court on its merits.

Wherefore, E. C. Atkins and Company, the Respondent herein, prays that the Respondent's Motion to Require the Board to strike said War Department Regulations, and any and all references thereto, from its Brief be granted.

Barnes, Hickam, Pantzer & Boyd,
By Kurt Pantzer,
Attorneys for Respondent.

Dated at Indianapolis, Indiana, October 4, 1944.

Filed October 5, 1944.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

October 9, 1944.

Before Hon. William M. Sparks, Circuit Judge.

National Labor Relations Board, *Petitioner,*
No. 8669 *vs.*
E. C. Atkins and Company, *Respondent.*

Petition for Enforcement of Order of the National Labor Relations Board.

It is ordered that the motion of respondent to require petitioner to conform appendix and brief to the rules of this Court be, and it is hereby, overruled, without prejudice to the right to present it at the hearing on the merits.

Excerpts from the Three Decisions of the National Labor Relations Board Cited in its Decision and Direction of Election (1 B. A. 35-6) as Being Cases in Which Employers Had Advanced the Contention That Auxiliaries of the Military Police Are Not Employees Within the Meaning of the National Labor Relations Act.

1. The Phelps Dodge Case.
2. The Chrysler Case.
3. The Dravo Case.

The Phelps Dodge Case.

Excerpt from the Decision of the National Labor Relations Board In the Matter of Phelps Dodge Copper Products Corp. and United Electrical, Radio & Machine Workers of America, Local No. 441, Affiliated with the Congress of Industrial Organizations (41 NLRB 973).

Hearing: April 27, 1942

Decision: June 15, 1942

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III. The Question Concerning Representation.

Shortly before the filing of the petition herein, the Union requested the Company to recognize it as the sole collective bargaining agent on behalf of the Company's guards at its Bayway plant. The Company refused to accord the Union such recognition upon the ground that the Union was the collective bargaining agent for the production workers in the plant and that the guards should not have the same representative as the production workers. Thereafter, the Union and the Company attempted to arrive at an amicable agreement which apparently contemplated setting up a separate local for the guards. No agreement was reached, however, and the Union proceeded with its petition.

A statement of the Regional Director introduced in evidence shows that the Union represents a substantial num-

the relationship between the Company and the guards is that of employer and employee. We find nothing in the duties of the guards set forth above to warrant a finding that they may be denied the rights to self-organization and collective bargaining guaranteed employees under the Act. We find that the guards are employees within the meaning of Section 2 (3) of the Act and are entitled to the benefits of the Act.

The Company contends, further, that the Union may not represent both a unit of guards and a unit of production and maintenance employees. But if the guards are employees within the meaning of the Act, then obviously it is not for the Company or for the Board to say that they may not join unions of production workers or designate such unions to represent them for purposes of collective bargaining.

• • • • •

The Chrysler Case.

Excerpts from the Decision of the National Labor Relations Board In the Matter of Chrysler Corporation, Highland Park Plant and Local 114, United Automobile, Aircraft and Agricultural Implement Workers of America, Affiliated with the C. I. O. (44 NLRB 881).

Hearing: July 13, 1942

Decision: October 7, 1942

• • • • •

Statement of the Case.

Upon petition duly filed by United Protective Workers of America, Local #1, herein called the Protective Workers, alleging that a question affecting commerce had arisen concerning the representation of employees of Chrysler Corporation, Detroit, Michigan, herein called the Company, the National Labor Relations Board provided for an appropriate hearing upon due notice before Charles E. Persons, Trial Examiner.[1]

• • • • •

IV. The Appropriate Unit.

The International contends that plant-protection employees at the Highland Park, McKinstry, and Dearborn plants of the Company in the Detroit metropolitan area constitute an appropriate unit. **As in the prior representation proceeding noted above, the Company takes the position that the confidential and disciplinary nature of the tasks assigned to plant-protection employees constitutes**

1. Charles E. Persons, the Trial Examiner in the representation hearing in the *Chrysler Case*, was also the Trial Examiner in the unfair labor practice hearing in the instant case and rendered the intermediate report to which exceptions are taken. (B. A. 21-33.)

them instruments of management[2] and that the proper performance of their duties precludes their inclusion as employees in a bargaining unit. The Company and the International agree that, if the Board finds that there is an appropriate unit within the scope of the petition, chiefs, captains, fire chiefs, fire marshals, sergeants, desk sergeants, relief sergeants, and confidential clerks should be excluded from the bargaining unit.

Plant-protection employees have similar duties in all the Company's plants. They guard the Company's property against espionage, theft, trespass, and fire and accident hazards. They enforce safety and disciplinary regulations. They examine packages leaving and entering the plants. They investigate and report to the military authorities occurrences which arouse their suspicion. The present production of war materials at the Company's plants increases the importance of their work and their responsibilities.

The War Department has recently issued a directive order, making plant-protection employees at plants producing war materials civilian auxiliaries of the military police.[3] Under appropriate Army supervision, they are being trained and equipped to meet the additional responsibility placed upon them. The Company contends that, even if their ordinary duties do not bar them from rights

2. (Emphasis Ours.) As in the *Phelps Dodge Case*, the contention of the employer in the *Chrysler Case* was that plant-protection employees were part of the management and consequently not properly included in the collective bargaining unit. In the instant case, it is the contention of the Respondent that the plant guards concerned are in no sense of the word representatives, agents or employees of management, but are "representatives", if not "employees" of the United States Army.

3. (Emphasis Ours.) Doubtless the "directive order" of the War Department is not a "directive order" signed by the Secretary of War, but merely a circular issued by Major General J. A. Ulio on July 2, 1942, eleven days before July 13, 1942, the day on which the *Chrysler Case* was tried. (Board's Brief, pp. 41-42, citing material which is not in evidence.) Circular No. 52, Headquarters, Services of Supply, August 28, 1942, subject "The Military Organization of Plant Guard Forces" had not yet been promulgated, much less Circular No. 15, Headquarters, Army Service Forces, March 17, 1943, subject "Auxiliary Military Police," which seems to be the basis of the Board's Brief. (Board's Brief, p. 20, citing material which is not in evidence.) It is to be noted in the *Chrysler Case* that the Board considers absolutely no testimony as to the actual practices respecting the right to hire, the right to fire, the right to direct the particulars of employment, and other incidents of the employer-employee relationship of Chrysler employees.

guaranteed under the Act, this military regulation changes their employment status and that they are no longer "employees" within the meaning of the Act. We do not agree. **The directive order specifically preserves the essential employment relationship.**[4] The employer's right to discharge for cause remains. Hiring, compensation for services performed, and general working conditions remain matters to be adjusted between the employer and the employees through the usual employment contract.

• • • • •

4. (Emphasis Ours.) It is the contention of the Respondent that the "directive order" of Major General J. A. Ulio, Adjutant General, promulgated July 2, 1942, cannot in any sense of the word be found specifically "to preserve the essential employment relationship." There is no word, as contained in the directive order, as to the rights of discharge, hiring, compensation for services, and adjustment of general working conditions. It is to be noted that "the usual employment contract" referred to by the Board is merely "the agreement between the United States of America and the plant guards." (Respondent's Exhibit No. 2, R. A. 54-5; Petitioner's Brief, pp. 43-4.)

The Dravo Case.

Excerpt from the Decision of the National Labor Relations Board In the Matter of Dravo Corporation and Industrial Union of Marine & Shipbuilding Workers of America (C. I. O.) (52 NLRB 322).

Hearing: June 17, 1943

Decision: August 30, 1943

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The Union seeks a unit comprised of all plant-protection employees at the Neville Island shipyard, excluding supervisory employees. The Company contends that the duties of its plant-protection employees are such that they necessarily come into conflict with the interests of the production and maintenance employees. Since the Union already represents the production and maintenance employees, the Company argues that it is improper to permit plant-protection employees to be represented by the same labor organization, albeit in separate bargaining units. In a communication to the Chairman of the Board, a copy of which is in evidence, the United States Army, Navy, and Maritime Commission urge the Board to exclude plant-protection employees who are enrolled as Auxiliary Military Police or in the Coast Guard Reserve of the Navy, from bargaining units of production and maintenance employees.

The unit here sought is composed of guards, watchmen, fleet watchmen, and firemen. All of these employees are hired and paid by the Company which is reimbursed by the Navy for its expenditures on wages, Social Security and Workmen's Compensation taxes. All employees are hourly paid, and their wage rates are set by the Company, subject however, to the approval of the Navy Department.

Guards.—In addition to the chief guard, lieutenants and sergeants, who are excluded from the unit by agreement, the Company employs approximately 114 guards. They are attached to the Company's Safety Department, are uniformed and carry firearms. They are enrolled members

of the Coast Guard Reserve, bearing ratings of First Class Petty Officer or Boatswain's Mate. Some 40 guards are likewise members of the Pennsylvania Volunteer Police Officer Force. Besides being answerable to the Company for the proper discharge of their duties, the guards are subject to the Articles for the Government of the Navy, the General orders of the Supervisor of Shipbuilding of the Navy, and the discipline of the Coast Guard.

In general, the guards are responsible for the protection of the shipyard and Government property entrusted to their care. They see that only persons with proper identification enter or leave the plant, and that objects taken from the shipyard are accompanied by clearance passes. They maintain order throughout the plant, particularly at the gates, in the company cafeteria, and among the crowds at launching ceremonies. They direct traffic on the Company's parking lot and on adjacent public highways. They escort discharged employees through tool and time clearance. They make routine checks of buildings and other plant facilities and make reports of any unusual conditions. They carry master keys to all the locks located in the shipyard area, and open tool boxes for the employees and keep records of the materials removed and the employees who remove them. The guards must be alert to all suspicious circumstances and are required to report such things as loafing by employees, refusal of employees to wear proper identification, any unsafe practices which come to their attention, violations of the law, and possible sabotage. If a guard discovers some action by an employee which requires immediate attention, he reports the matter to the foreman of the employee involved. When the matter does not require immediate attention by a supervisor, the guard reports it to the chief guard who reports the matter to various Company officials and to a Navy representative. **The guards have discharged their duty when they report incidents to their superior or to a production foreman. They have no discretion as to the type of penalty which is meted out for infraction of rules and have no supervisory functions with respect to the production employees but can merely report incidents of employee conduct which are**

in violation of rules and regulations or which are hazardous to the war effort.[1]

* * * * *

We turn now to the consideration of the various contentions made by the Company in support of its argument that the unit herein sought is inappropriate. **The Company first contends that the plant-protection employees are a part of management.**[2] Despite the peculiar relationship which plant-protection employees bear to management, they are not to be denied any of the rights or privileges granted under Section 7 of the Act. We have often held, as we do now, that plant-protection officers exercise monitorial and not supervisory functions. The record in the instant case affords ample evidence that the guards have no disciplinary authority over the production and maintenance employees, so that while disciplinary measures may result from a report made by a guard, such action is the conduct of the supervisor of the employees involved, and not the conduct of the guard. **At the oral argument the Company urged that plant-protection employees perform managerial functions which are delegated to them by the Company's Board of Directors.**[2] While it is true that management may have partially delegated certain duties to plant-protection employees, this does not mean that such employees are deemed to be a part of management or should not be regarded as "employees" within the meaning of the Act.

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1. (Emphasis Ours.) It is to be noted that the guards in question were members of the Coast Guard Reserves and were subject to the Articles for the Government of the Navy, the general orders of the Supervisor of Shipbuilding of the Navy, and the discipline of the Coast Guard. In this respect the guards in the *Dravo Case* are entirely different from the guards in the instant case, the latter being subject to the Articles of War. (Respondent's Exhibit No. 9; R. A. 53-61.) In addition the plant guards at the Atkins plant have not discharged their duty when they report incidents to their superior or to a production foreman. As a matter of fact, they have absolutely no obligation to make reports to a production foreman, their only duty and right being to report to another member of the Auxiliary Military Police.

2. (Emphasis Ours.) Again it is pointed out that in the instant case there is absolutely no contention that the plant guards "perform managerial functions which are delegated to them by the Respondent's Board of Directors." The sole contention of the Respondent is, and the facts amply show, that the Respondent, E. C. Atkins and Company, has in no manner whatever sought to exercise any authority or control over the plant guards and that all authority and control over them is exercised by the Army officers in command of the Auxiliary Military Police.

This Board has never held that the acts of plant guards are unfair labor practices which can be imputed to an employer in the absence of circumstances indicating that the employer authorized or ratified the conduct in question. In this respect, guards and other plant-protection employees are quite different from foremen or other supervisory personnel. In the second *Maryland Drydock* decision we expressly overruled such a contention saying, "the considerations which impelled a majority of the Board recently to hold that supervisory employees may not constitute appropriate bargaining units are here inapplicable." This proceeding presents no novel situation of fact which would lead us to depart from that rule.

The second argument raised by the Company deals with a possible conflict of interest which may arise when plant-protection employees join a labor organization. We give no weight to the implication that membership in a union tends to undermine the honesty of plant-protection employees or their competence to execute their duties satisfactorily. Self-organization for collective bargaining is not incompatible with efficient and faithful discharge of duty. Should the performance of an employee deteriorate, the Company always has recourse to its normal disciplinary authority to insure the maintenance of its standards of work.

We come now to the question whether the militarization of guards alters the character of their employment. It cannot seriously be contended at this time that guards who are sworn into temporary membership in the armed services lose thereby any of the benefits of the Act. On this issue, the petitioner and the Company are far apart in their contentions, the Union arguing that the fact the guards are sworn into reserve membership in the armed services is no reason for segregating them from other employees, whereas the Company urges that this should prevent these employees from being represented by any union which represents any other category of personnel employed by the corporation. In our view, neither contention can be supported. We cannot regard the induction of the guards into the Coast Guard Reserve as a meaningless

act, since it does indicate that such persons from the nature of their oaths then owe allegiance directly to the Government, as well as to the corporation. **The services do not contend, however, that such persons thereby become Government employees and are therefore outside the provisions of the Act.**[3] Nor would the facts in this case support such a contention, for it is clear that the wages and **duties of this group of personnel remained unchanged after their induction so that it is apparent that the proximate relationship of employer and employee still exists between the Company and the guards.**[4]

We therefore feel constrained to hold that the guards, as well as other employees, are free to select their own bargaining representatives under the Act.

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3. (Emphasis Ours.) As the evidence cited in Respondent's Brief so amply shows, however, the services *do* contend that plant guards are the "auxiliaries" and "representatives" of the Army and *not of* the Employer. They are subject to direction and discipline of the Army and not of the Employer. The mere incident of *compensation*, alone, does not keep plant guards from being the "representatives" of the Army. Furthermore, as pointed out in Respondent's Brief the National Labor Relations Act has not granted to the War Department the right to issue rules and regulations under the National Labor Relations Act. The sole question for decision in the *Atkins Case* is whether the incidents of "employment" of the plant guards by the Respondent are such as to constitute them "employees" of the Respondent within the meaning of National Labor Relations Act.

4. (Emphasis Ours.) The duties of the Plant guards in the *Atkins Case* did *not* remain unchanged after their induction.

BOARD'S EXHIBIT NO. 105.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

For the Ninth Region.

In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90 and Its Affiliate, Local 1683, *Petitioner.*	Case No. 9-R-1200.

BRIEF OF E. C. ATKINS AND COMPANY.

PRELIMINARY STATEMENT.

Under date of September 10, 1943, International Association of Machinists, District 90 and its affiliate, Local 1683, hereinafter sometimes referred to as I.A.M., filed its Petition for Investigation and Certification of Representatives of the plant guards of E. C. Atkins and Company at its two Indianapolis, Indiana, plants with the National Labor Relations Board for the Ninth Region at Cincinnati, Ohio. (Exh. Board 1-A, Tr. 5.) A Notice of Hearing was thereupon issued by Rosemary S. Macke, Acting Regional Director (Exh. Board 1-A, Tr. 5), and a hearing was held at Indianapolis, Indiana, on September 24, 1943, before Trial Examiner Shroyer.

(2)

At the beginning of the hearing E. C. Atkins and Company, hereinafter sometimes referred to as the Company, moved to dismiss the Petition on the ground that the Company is not an "employer" and the plant guards are not "employes" of the Company under the definitions of those terms in the National Labor Relations Act. (Tr. 6.) This motion is reprinted in full in the appendix, *infra*, pages 21-

22. The Trial Examiner referred this motion to dismiss to the Board for ruling. (Tr. 7.)

During the course of the hearing the Company also applied for a subpoena duces tecum directed at F. M. Richardson to produce certain union records alleged to contain evidence in support of the Company's contention that the Petition should be dismissed. (Exh. Company 1, Tr. 11.) This application for a subpoena duces tecum appears in the appendix, *infra*, pages 23-25. The Trial Examiner granted the application with respect to the charter, constitution, and by-laws of the I.A.M. (Tr. 11), but denied the application insofar as it related to the minute book, membership roll, application cards, membership cards, dues book, bank book, check book, cancelled checks, correspondence and other records relating to the purposes, activities and membership of the I.A.M. (Tr. 14.) The Company contends that these union records contain evidence that is relevant to material issues in this proceeding and that the Trial Examiner erred in denying its application for a subpoena duces tecum.

This brief is filed on behalf of E. C. Atkins and Company pursuant to Section 203.9 of the Rules and Regulations of the National Labor Relations Board. The time for filing this brief was extended by telegram to October 11, 1943.

(3)

THE PARTIES.

(1) *The Company.* E. C. Atkins and Company is a corporation organized and existing under the laws of the State of Indiana, with two plants in Indianapolis, Indiana. The main plant in Indianapolis, which occupies two entire city blocks and is bounded on the north by South Street, on the west by Capitol Avenue, on the east by Illinois Street, and on the south by Merrill Street, has been in operation since 1857. The Federal Government owns the new armor plate plant employed by the Company in war production at the southeast corner of Twenty-first Street and Northwestern Avenue. (Tr. 8.)

The Company is engaged in the business of manufacturing and selling saws, tools, and armor plate. Approximately eighty per cent of the raw materials (consisting principally of steel, castings, and lumber) used in the business of the Company is purchased and shipped in interstate commerce from sources outside the State of Indiana, and approximately eighty per cent of the finished products produced by the Company is sold in interstate commerce to purchasers outside the State of Indiana. During the calendar year 1942, the raw materials used by the Company exceeded $500,000 in value and the gross sales price of its finished products was over $1,000,000. The finished product of the Company is disposed of to the United States Government, jobbers, dealers, subcontractors and direct to manufacturing consumers. During the calendar year 1943 to the date of this hearing, the manufacturing and selling operations of the Company have continued substantially along the same lines as those set forth above for the year

1942. (Tr. 9, 10.) The Company admits that it is engaged in interstate commerce within the meaning of that term in the National Labor Relations Act. (Tr. 10.)

(2) *I.A.M.* The International Association of Machinists, unaffiliated, is an international union admitting workers in a machine or metal industry to membership (Exh. Petitioner 1, Tr. 44). Local 1683, the particular unit involved in this proceeding, admits to membership employes of concerns other than the Company (Tr. 37, 45) but all of the members of Local 1683 are employed as plant guards (Tr. 41). There is nothing in its constitution or by-laws that authorizes it to organize plant guards (Tr. 46). On August 18, 1943, an I. A. M. representative wrote a letter requesting recognition of that union as the bargaining agent for the plant guards (Exh. Board 3, Tr. 15); the Company did not reply to the letter (Tr. 15) and still declines to recognize the union (Tr. 16). The I. A. M. is the Petitioner for Investigation and Certification of Representatives in this case.

Facts.

The Company employs approximately 1,267 regular employes, of which 1,208 are members of the C. I. O. Union and 59 are members of the Saw Smiths' Local Union (Tr. 82, 83), and it has entered into contracts with both these unions (Exhs. Company 17, 18, 19, 20, Tr. 85, 88). The representation of these employes is not involved in this proceeding. Prior to the time the Company became engaged in war production, it employed from four to six night watchmen (Tr. 88) but it is now required because of its government contracts to pay the salaries of over

sixty auxiliary military police or plant guards. (Tr. 76, 83, 88-90.) The representation of these plant guards is the subject of controversy in this case. The Company contends that these plant guards are not its employes but are under the control of the United States Army and are therefore employes of the federal government. This point is made clear by the contrast between the status of the Company's regular employes and the auxiliary military police in question which the testimony at the hearing disclosed.

Duties of Plant Guards.

The general duties of auxiliary military police are set forth in a letter issued June 7, 1943, by the Continuous Security District Office of the War Department at Cincinnati, Ohio, and signed by Lieutenant Colonel A. C. Rasmussen. (Exh. Company 4, Tr. 35.) It states on page 2:

> "The mission of a guard force of Auxiliary Military Police is:
>
> "*a.* To provide interior and exterior protection of the plant against sabotage and espionage and natural hazards.
>
> "*b.* To serve with the Army in providing the protection to the plant and its environs in emergency situations."

Specifically their duties include directing traffic, escorting visitors, watching the gates and entrances, transporting cash within the plant, observing productions workers and other activities designed to prevent interruption of production. (Tr. 21.)

(6)

The nature of these duties requires that plant guards work under conditions that are very different from those of any of the company's regular employes. They wear uniforms (Tr. 20), carry guns (Tr. 20), and salute army officers (Tr. 64), and they have the right to arrest anyone in the plant. (Tr. 22, 30, 31, 74.) The company issues identification cards to its production employes, officers, directors and other agents (Exh. Company 21, Tr. 94), and requires them to wear identification badges. (Tr. 94.) In contrast the plant guards carry identification cards issued by the War Department (Exh. Company 3, Tr. 27), and wear arm bands on which are written the words "Auxiliary Military Police". (Tr. 65.) Ordinary employes have to have special passes to enter the armor plate division from outside the plant (Exh. Company 14, Tr. 65), to enter the armor plate division from inside the plant (Exh. Company 15, Tr. 66), or to go in and out of the plant grounds during working hours (Exh. Company 16, Tr. 66), but plant guards are not subject to such regulations. The Company does not give any military instruction to its production employes (Tr. 92), but army officers train the plant guards (Tr. 30). The instructions given the auxiliary military police each week consists of lessons in the use of clubs and fists, pistol marksmanship, military courtesy, methods of arrest, control and prevention of fires and similar topics (Tr. 71), and is under the supervision of Lieutenant Scanlon of United States Army (Tr. 30). These facts show the great dissimilarity between the duties of a plant guard and the job of an ordinary production employe.

(7)

HIRING OF PLANT GUARDS.

Persons seeking to become auxiliary military police apply at the personnel office of the Company and fill out a regular "Application for Employment" (Exh. Company 5, Tr. 24, 50). A representative of the Company interviews the applicant and submits his name to the military authorities at Cincinnati if he is satisfactory (Tr. 95). However, the army officers make the decision as to whether the applicant will be hired after they have made an independent investigation as to his capacity, integrity and patriotism (Tr. 51, 95). The letter issued June 7, 1943, by the Continuous Security District Office of the War Department at Cincinnati and referred to above clearly states:

> "A member of the Auxiliary Military Police may not be employed, dismissed, or may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto." (Exh. Company 4, Tr. 35.)

Applicants who are approved must take an oath to support the Constitution of the United States and the authorized military authorities (Tr. 20, 27, 50), and must sign an "Agreement between the United States of America and ..... Plant Guard" on the form prescribed by the government (Exh. Company 2, Tr. 25). If the plant guard refuses to sign this agreement, his employment will be terminated (Exh. Company 4, Tr. 35, 54). Finally, the army issues a "Certificate of Enrollment" signed for the Commanding General, Fifth Service Command, by Lieutenant Colonel Rasmussen (Exh. Company 6, Tr. 55).

(8)

SUPERVISION AND CONTROL OF PLANT GUARDS.

The supervision of plant guard forces in this area has been provided for as follows:

> "The Commanding General of the Fifth Service Command has designated the Chiefs of the Continuous

> Security Districts as the Commanding Officers in their various districts. * * * They then appoint District Plant Guard Officers, who are in direct charge of plant guard forces of such plants in their districts." (Letter issued June 7, 1943, by the Continuous Security District Office of the War Department at Cincinnati, Ohio; Exh. Company 4, Tr. 35).

Lieutenant Colonel A. C. Rasmussen is District Chief (Exh. Company 4) and Captain B. R. Wetenhall is District Plant Guard Officer for the Cincinnati area (Exh. Company 8). The auxiliary military police at each of the Company's plants are under the direction of a Chief, who has four lieutenants to assist him (Tr. 51).

At present the work of the plant guards is controlled by three General Orders issued by Captain Wetenhall in May of this year (Exhs. Company 10, 11, 12, Tr. 62). The nature of the control which the army maintains over the auxiliary military police is clearly indicated by the following paragraphs from General Order No. 1 (Exh. Company 10):

> "Pursuant to the orders of the War Department, the guard forces at this plant were activated as Auxiliary Military Police, and for military purposes will be commanded, drilled, and instructed as military units.

> "All members of the guard force are subject to the Articles of War and may be court-martialed or otherwise punished for violations thereof.
>
> "A commissioned officer of the Army of the United States has been placed in command. Although in command at all times, this officer has not superseded the civilian guard officers and normally will exercise direct control only in matters relating to military instruction and duties as Auxiliary Military Police.
>
> "The mission of this guard force is to provide protection for this plant. In addition to its normal functions, the force or any member thereof, whether on or off duty, is available for military use in any emergency, whether it be the result of floor, fire,

or other disaster; internal disorders hazardous to the plant property or its production; or enemy action of any nature. *No conflicting interest of any kind will be permitted to interfere with the successful accomplishment of this mission.*"

Within each individual plant the Chief supervises the work of the plant guards. He determines whether the men will automatically trade shifts or will always work the same hours (Tr. 70), he promotes men without reference to seniority (Tr. 67, 77) and the men have no recourse from his disciplinary action (Tr. 67). Although the Chief and the men make every effort to co-operate with the plant management (Tr. 64), they are not subject to the orders of the Company's officers (Tr. 69, 73, 90); it is understood throughout the plant that the auxiliary military police are under the military authorities and are not responsible to the foremen or other Company employes (Tr. 91). The Chief in turn receives his instructions from

Captain Wetenhall, the District Plant Guard Officer (Tr. 59, 63), and he frequently carries on correspondence with Captain Wetenhall concerning the problems that arise in connection with his work (Tr. 79).

Discharge of Plant Guards.

General Order No. 1 issued by Captain Wetenhall and referred to above provides as follows with respect to the discharge of plant guards:

> "No member of the Auxiliary Military Police may resign without the written approval of the District Plant Guard Officer." (Exh. Company 10).

A plant guard may be relieved of his duty temporarily by the Chief of the plant unit or the Company, but neither has the authority to discharge him permanently (Tr. 58). Upon termination of a plant guard's employment the army awards him a "Certificate of Meritorious Conduct" (Exh. Company 7, Tr. 57) unless he is discharged for misconduct,

absence without leave, drunkenness or for some military reason, in which event only a formal release from his agreement with the United States Government is issued (Exh. Company 8, Tr. 58).

The above analysis of the record has demonstrated that the duties of the auxiliary military police are of an extremely different nature from those of ordinary production employes and that as a result the hiring, supervision, control and discharge of such employes is handled by the regular military authorities, who are obviously better qualified to direct plant protection activities than the plant management.

(11)

QUESTIONS PRESENTED.

I. Does the relationship of employer and employee exist between auxiliary military police engaged in guarding a defense plant and the company that operates the plant.

II. Is it a denial of due process under the Federal Constitution for the National Labor Relations Board to refuse to issue a subpoena *duces tecum* for union records at the request of an employer when the union records contain relevant evidence regarding material issues in a representation case.

(12)

ARGUMENT

I. THE RELATIONSHIP OF EMPLOYER AND EMPLOYEE DOES NOT EXIST BETWEEN THE AUXILIARY MILITARY POLICE AND E. C. ATKINS AND COMPANY UNDER THE DEFINITION OF "EMPLOYER" IN SECTION 2 (2) AND "EMPLOYEE" IN SECTION 2 (3) OF THE NATIONAL LABOR RELATIONS ACT.

The protection of defense plants against sabotage and espionage requires employees with skills that are of a very different nature than those of ordinary production em-

ployees. As a result the training and supervision of auxiliary military police has been taken over to a large degree by the Army of the United States. The question is therefore presented whether a company operating a defense plant has relinquished so much of its control over its plant guards to the Army that the relationship of employer and employee no longer exists within the definition of those terms in the National Labor Relations Act (29 U. S. C. A. § 152).[1] In this proceeding it is the contention of the Company that since the hiring, training, supervision and discharge of auxiliary military police depends upon the decisions of Army officers, the Company no longer controls them and is not their employer. If this is the case, the Petition for Investigation and Certification of Representa-

tives should be dismissed, since it is obvious that the Federal Government, the other possible employer involved, is not included within the definition in the Act.

The problem of determining whether the employer-employee relationship exists in a particular situation has also arisen in connection with the Fair Labor Standards Act, which defines the term employee in a similar manner (29 U. S. C. A. § 203).[2]

In *Bowman* v. *Pace Co.*, 119 F. (2d) 858 (C. C. A. 5, 1941), the court decided that a watchman was not an employee of the wholesale grocery company whose premises he guarded, although he was under the direction of the company to some extent, because he was hired and paid by a third person and his discharge was the third person's affair. Likewise in *Williams* v. *United States*, 126 F. (2d) 129 (C. C. A. 7, 1942), the court emphasized the fac-

1. Sec. 2. When used in this Act—
(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States or any State or political sub-division thereof * * *
(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer unless the Act explicitly states otherwise * * *."

2. Sec. 3. As used in this Act—
(e) "Employee" includes any individual employed by an employer.

tors of direction, hiring, payment and discharge mentioned in the *Bowman* case and held that no relation of "employer and employee" existed for purposes of the federal social security tax. The court said:

> "• • • There seems to be no dispute but that the employer-employee relationship exists only where the person, for whom the work is done, has the right to control and direct the work, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. *Singer Mfg. Co.* v. *Rahn*, 132 U. S. 518, 10 S. Ct. 175, 33 L. Ed. 440; *Jones* v. *Goodson*, 10 Cir., 121 F. 2d 176, 179."

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> "We have already concluded, not inconsistent with the findings of the court below, that the establishments had no right to hire or discharge the members of the orchestra. To our mind, this circumstance alone comes near being decisive. It is difficult to conceive of an employer-employee relationship without such a right on the part of the employer."

In *Texas Co.* v. *Higgins* (C. C. A. 2, 1941), 118 F. 2d 636, Judge Learned Hand adopted the same position:

> "Were the question presented to us for the first time, we should have no doubt that Thomas and his assistants were not 'employees' of the plaintiff; the Act appears to take over the term as the common law knew it, and at common law they would not be employees. The regulation is in harmony with this assumption, for it enumerates the generally accredited determinants in such cases, of which the most important is the putative employer's control over the employee's business."

The Indiana courts have likewise attached importance to the right of control in deciding whether the relationship of employer and employee is present. In *Mid-Continent Petroleum Corporation* v. *Vicars*, 47 N. E. (2d) 972 (Indiana Supreme Court, 1943), the question was whether an

injured workman was the employee of the lessor or the employee of the lessee of an oil station. The court held that the plaintiff was not the employee of defendant lessor and quoted with approval the following language from *Marion Shoe Co.* v. *Eppley,* 181 Ind. 219, 104 N. E. 65 (1914):

> "The real test is, was appellee, at the time he sustained his injury, under the power and control

> of appellant and subject to its orders and directions in the doing of the work at hand."

The above cases indicate that at least four factors must be considered in determining whether an employer-employee relationship exists. First, who hires the worker? Although applicants are interviewed at the E. C. Atkins and Company plant, the military authorities in Cincinnati make the final decision (Tr. 51, 95). Second, who supervises their work? In the instant case the Chief in the plant unit directs the men (Tr. 67, 70, 77) and he is responsible to the Army officers (Tr. 59, 63, 79). Third, who discharges the guards? The Company and the Chief in the plant unit may suspend a member of the auxiliary military police but the military authorities actually discharge him (Tr. 58, Exh. Company 10). Fourth, who pays the men? The Company pays the plant guards (Tr. 23). It is submitted that the first three criteria (hiring, supervision, and discharge) clearly show that the federal government is the employer of the auxiliary military police and that these three factors overbalance any inference based on the method of payment that the Company employs the men.

The question concerning the existence of an employer-employee relationship has not been squarely presented in any previous case before the National Labor Relations Board. *In the Matter of Budd Wheel Company,* Case No. R-5787 (September 17, 1943), the Board reviewed the prior cases and decided that the plant protection force there involved was an appropriate unit for purposes of collective

bargaining. However, the Board found that the "Company still hires and discharges the guards" and the situation is

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thus entirely different from that presented in this proceeding. Here the record clearly shows that the ultimate right to hire and fire rests with the army officers, *supra*, pp. 7 and 10, so that the *Budd Wheel* case is not applicable.

Another recent case involving plant guards is *In the Matter of Dravo Corporation*, Case No. R-5570 (August 30, 1943). The only reference in the opinion of the Board to the character of the relationship between the guards and the Company is the statement that "the wages and duties of this group of personnel remained unchanged after their induction so that it is apparent that the proximate relationship of employer and employee still exists between the Company and the guards." In the instant case Mr. Cyrus E. Wood, personnel director for the Company, pointed out that whereas the Company formerly employed six night watchmen it now pays over sixty auxiliary military police because of its war production (Tr. 88). The hiring, direction and firing of these new plant guards is no longer within the control of the company, *supra*, pp. 7-10, and it cannot reasonably be said that there has been no substantial change in this job as a result of the supervision of the military authorities.

The earlier decisions of the Board are all based on the fact that after the militarization of the plant guards the Company still had the right to discipline them, or to discharge them for cause, or to hire new guards. *Matter of Bethlehem Steel Company*, 46 N. L. R. B. 794 (January 6, 1943); *Matter of Johns-Manville Products Corporation*, 45 N. L. R. B. 33 (October 22, 1942); *Matter of Campbell Soup Company*, 45 N. L. R. B. 6 (October 22, 1942); *Matter of Chrysler Corporation, Highland Park Plant*, 44 N. L. R. B.

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881 (October 2, 1942). At the plant of E. C. Atkins and Company the Chief of the auxiliary military police disciplines the men (Tr. 67) and he is not subject to any direc-

tion by the Company (Tr. 69, 73, 90); the Company can only relieve a guard from duty temporarily (Tr. 58), and all discharges require the written approval of the District Plant Guard Officers, Captain Wetenhall (Exh. Company 10); army officers make the final decision with respect to the hiring of applicants for the job of auxiliary military police (Tr. 51, 95, Exh. Company 4). The previous decisions of the Board are therefore not in point. Since the federal government and not the army employs the plant guards, the Petition for Investigation and Certification of Representatives should be dismissed.

Finally, the purpose of the auxiliary military police is to prevent interruptions of production (Tr. 73). General Order No. 1 (Exh. Company 10) issued by Captain Wetenhall, specifically states that no conflicting interest of any kind will be permitted to interfere with the successful accomplishment of the guards' mission. Yet by its very nature unionization and collective bargaining between the representatives of the auxiliary military police and the Company may produce situations incompatible with efficient supervision of the work by the military authorities. A strike resulted at the Johnsonville, Pennsylvania plant of the Brewster Aeronautical Corporation because the union protested the assignment of guards to duty without regard to seniority rights (War Labor Board decision of September 25, 1942), and another recent War Labor Board case followed the demands of the union leaders of plant guards for a union maintenance contract at a war plant. (*In re*

Virginia Rubatex Division, Great American Industries, Case No. 111-476-R, August 27, 1943.) Similar union demands at the E. C. Atkins and Company plant would interfere with the broad control which the military authorities now exercise over the hiring, supervision and discharge of auxiliary military police.

II. THE TRIAL EXAMINER ERRED IN DENYING THE COMPANY'S APPLICATION FOR A SUBPOENA DUCES TECUM DIRECTED AT THE UNION LEADER TO PRODUCE THE MINUTE BOOK, MEMBERSHIP ROLL, APPLICATION CARDS, MEMBERSHIP CARDS, CORRESPONDENCE AND OTHER RECORDS RELATING TO THE PURPOSES, ACTIVITIES AND MEMBERSHIP OF I. A. M.

The chief obstacle to unionization of the plant guards involved in this case is the broad control which the military authorities possess over their activities. It is the contention of the Company that the demands of the union may conflict with the mission of the auxiliary military police in such a manner that production will be interrupted. In this connection the activities of this union in the other defense plants in which it has members (Tr. 37, 45) is material evidence, but the Company was prevented from introducing such evidence by the refusal of the Trial Examiner to grant its application for a subpoena *duces tecum* (Tr. 14). The record does not show whether the union has or has not demanded seniority rights, maintenance of membership contracts and other privileges which interfere with the protection of the defense plants. Likewise the records of I. A. M. contain the purposes for which Local 1683 is organized and if they are sufficiently definite, they might

show that it is attempting to organize employes of the United States, which is expressly prohibited by the National Labor Relations Act.

It is a well established principle of administrative law that the right to a full hearing implies the privilege of introducing all evidence which is competent, material and relevant to the issues and argument. *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 59 S. Ct. 206 (1938); *Interstate Commerce Commission* v. *Chicago R. I. P. Ry. Co.,* 218 U. S. 88, 30 S. Ct. 651 (1909); *Ohio Bell Telephone Company* v. *Public Utility Commission,* 301 U. S. 292, 57 S. Ct. 724 (1936); *National Labor Relations Board* v. *Indiana and Michigan Company,* U. S.

Supreme Court, January 19, 1943. Refusal of an agency to issue subpoenas to a party to an administrative proceeding is merely one method of preventing him from introducing competent evidence. The refusal of the Trial Examiner to issue the subpoena requested by the Company, therefore, deprived the Company of a fair hearing and constituted a denial of due process under the Federal Constitution.

The Trial Examiner also admitted in evidence over the objection of the Company a "Statement of Field Examiner Concerning Claims of Authorization for the Purpose of Representation" dated September 11, 1943 (Exh. Board 4, Tr. 18). This is an important piece of evidence inasmuch as the Petition for Investigation and Certification of Representatives filed by I. A. M. should be dismissed if the I. A. M. does not have a substantial number of members in the plant. The Company, however, was not permitted to cross-examine the individual who made the statement or the data on which it was based.

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The material upon which an agency or other party proposes to rely as established fact, including the data upon which it is based, should be open for inspection by interested parties. The United States Supreme Court recognized this principle as early as 1912 when it said:

> "• • • All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense." *Interstate Commerce Commission* v. *Louisville and N. R. Co.*, 227 U. S. 88, 33 S. Ct. 185 (1913).

The failure of the Trial Examiner to sustain the Company's objection to this secret evidence was material error and deprived the Company of a fair hearing. *Crowell* v. *Benson*, 285 U. S. 22, 52 S. Ct. 285 (1932).

Conclusion.

The Petition of I. A. M. for Investigation and Certification of Representatives of auxiliary military police should be dismissed.

Respectfully submitted,

Barnes, Hickam, Pantzer and Boyd,
Attorneys for E. C. Atkins and Company,
1313 Merchants Bank Bldg.,
Indianapolis, Indiana.

Kurt F. Pantzer,
Lewis D. Spencer,
Of Counsel.

Filed October 11, 1943.

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APPENDIX.

BEFORE THE NATIONAL LABOR RELATIONS BOARD
For the Ninth Region

In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90 and Its Affiliate, Local 1683, *Petitioner.*	Case No. 9-R-1200

MOTION OF E. C. ATKINS AND COMPANY TO DISMISS PETITION FOR CERTIFICATION.

Comes now E. C. Atkins and Company, one of the parties to this proceeding (hereinafter referred to as the "Company"), and moves to dismiss the Petitioner's Petition for

Investigation and Certification of Representatives herein for the following reasons:

1. E. C. Atkins and Company is not and cannot be an employer within the meaning of Section 2, Subsection 2, of the National Labor Relations Act with respect to auxiliary military police who wholly constitute the bargaining unit set forth in Item 4 of the Petition for Investigation.

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2. The employes referred to in the petition for investigation can not come within the definition of the word "employes" under the provisions of Section 2, Subsection 3, of the National Labor Relations Act with respect to the alleged employer, E. C. Atkins and Company.

3. The relationship of employer and employee with its various interests has never set in and is not existing at this time with respect to the auxiliary military police referred to in the Petition for Investigation and E. C. Atkins and Company.

Wherefore, E. C. Atkins and Company respectfully prays that the Petitioner's Petition for Investigation and Certification of Representatives be dismissed.

E. C. Atkins and Company,
By Kurt F. Pantzer,
Attorney.

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Ninth Region

In the Matter of E. C. Atkins and Company and International Association of Machinists, District 90 and their affiliate, Local 1683, *Petitioner.*	Case No. 9-R-1200

APPLICATION FOR SUBPOENA *DUCES TECUM* DIRECTED AT F. M. RICHARDSON TO PRODUCE UNION RECORDS.

Comes now E. C. Atkins and Company, one of the parties to this proceeding, and respectfully applies for a subpoena *duces tecum* directed at F. M. Richardson, Business Representative, International Association of Machinists, District 90, and their affiliate, Local 1683 (hereinafter referred to as the "Union"), one of the parties to this proceeding, to produce the following documents:

1. Charter, Constitution and By-Laws of the Union;

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2. Minute book, membership roll, application cards, membership cards, dues books, bank book, check book, cancelled checks, correspondence and other records relating to the purposes, activities and membership of said Union;

in order that E. C. Atkins and Company may establish (a) the identity of the Union, within the purview of Section

2, subsection (5) of the National Labor Relations Act; (b) whether "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana, plants, excluding sergeants, lieutenants, captains and chiefs," are "employees" within the purview of Section 2, subsection (3) of the National Labor Relations Act; (c) whether "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana, plants, excluding sergeants, lieutenants, captains and chief," have "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection," within the purview of Section 7 of the National Labor Relations Act; (d) whether it is an unfair labor practice for E. C. Atkins and Company "to refuse to bargain collectively with the representatives of "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana, plants, excluding sergeants, lieutenants, captains and chief," within the purview of Section 8, subsection (5) of the National Labor Relations Act; and (e) whether "all plant guards employed by E. C. Atkins and Company at its two Indianapolis, Indiana, plants, excluding sergeants, lieutenants, captains and

chief," can properly be found to be a "unit appropriate for the purposes of collective bargaining," within the purview of Section 9, subsection (b) of the National Labor Relations Act.

E. C. Atkins and Company,
By Kurt F. Pantzer,
Attorney.

BOARD'S EXHIBIT 106.

UNITED STATES OF AMERICA.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

For the Ninth Region.

In the Matter of E. C. Atkins and Company, and International Association of Machinists, District 90 and Their Affiliate, Local 1683.	Case No. 9-R-1200.

PETITION OF E. C. ATKINS AND COMPANY FOR RECONSIDERATION OF DECISION AND DIRECTION OF ELECTION DATED OCTOBER 19, 1943, AND ORAL ARGUMENT THEREON BEFORE THE FULL BOARD.

E. C. Atkins and Company, the employer involved in the above-entitled proceeding, respectfully shows the National Labor Relations Board that:

1. On October 19, 1943 the National Labor Relations Board, hereinafter referred to as the Board, entered its Decision and Direction of Election in this case.

2. One of the material issues therein is whether the relationship of employer and employee exists between the plant guards involved (hereinafter referred to as auxiliary military police) and E. C. Atkins and Company (hereinafter referred to as the Company) under the definition of "employer" in Section 2(2) and "employee" in Section 2(3) of the National Labor Relations Act.

3. The Decision and Direction of Election referred to above fails to discuss or consider in any manner the facts proved at the hearing with respect to the peculiar incidents and status of employment of the auxiliary military police, merely concluding that they are "plant guards, who are all

auxiliaries of the military police" although the bulk of the 98-page official transcript and the 23 exhibits presented by the Company at the hearing deals with the peculiar incidents and status of employment of the auxiliary military police in great detail, differentiating therefrom "employees" as defined in the National Labor Relations Act.

4. The official transcript and the exhibits of the Company conclusively show that the auxiliary military police are hired by army officers, are supervised and controlled by army officers, and are discharged by army officers.

5. If the Board in its Decision and Direction of Election had found the facts incontrovertibly proved by the Company at the hearing, it would have been unable to conclude, as it did, "that the relationship of employer and employee still exists" or ever did exist between the auxiliary military police and the Company.

6. If the Board in its Decision and Direction of Election had found the facts incontrovertibly proved by the Company at the hearing, the inapplicability of the three prior decisions relied upon by the Board would be obvious.

7. The Board erred in concluding that the auxiliary military police were employees of the Company.

Wherefore, the Company prays that the Board reconsider its Decision and Direction of Election dated October 19, 1943 and grant the Motion to Dismiss the Petition for Certification made by the Company at the hearing. The Company respectfully requests permission to argue this petition before the full Board in Washington in support of said prayer.

Kurt F. Pantzer,
Attorney for E. C. Atkins and Company.

MEMORANDUM IN SUPPORT OF PETITION.

The 98-page official transcript and the 23 exhibits presented by the Company at the hearing were analyzed in the brief filed by the Company on October 11, 1943. The following summary indicates the facts proved at the hearing

and ignored by the Board in its Decision and Direction of Election dated October 19, 1943.

Duties of Plant Guards. The mission of a guard force of Auxiliary Military Police is to provide interior and exterior protection of the plant against sabotage, espionage and natural hazards and to serve with the Army in providing the protection to the plant and its environs in emergency situations. (Exh. Company 4, Tr. 35.) In this respect their general orders while on post are identical in wording and substance (Exh. Company 11) with those of a sentinel of the regular armed forces on guard duty as prescribed by the Basic Field Manual, Soldier's Handbook (Exh. Company 13). Specifically, their duties include directing traffic, escorting visitors, watching the gates and entrances, transporting cash within the plant, observing production workers, and other activities designed to prevent interruption of production (Tr. 21). They wear uniforms (Tr. 20), carry guns (Tr. 20), and salute army officers (Tr. 64). Their identification cards are issued by the War Department (Exh. Company 3, Tr. 27) and such cards differ materially from those issued to ordinary employees by the Company (Exh. Company 21, Tr. 94). The plant guards are given weekly instruction in the use of clubs and fists, pistol marksmanship, military courtesy, methods of arrest, control and prevention of fires and similar topics by army officers (Tr. 30, 71).

Hiring of Plant Guards. Army officers determine whether an applicant will be hired as a plant guard after they have made an independent investigation of his capacity, integrity and patriotism (Exh. Company 4, Tr. 35, 51, 95). Each plant guard enters into a contract of employment with the United States of America (Exh. Company 2, Tr. 35) and receives a "Certificate of Enrollment" signed by Lieutenant Colonel Rasmussen of the United States Army (Exh. Company 6, Tr. 55).

Supervision and Control of Plant Guards. Within each individual plant the Chief of the plant guards supervises their work and determines the shifts they work (Tr. 70), makes promotions (Tr. 67, 77) and has charge of discipline (Tr. 67). The Chief and his men are not subject to the

orders of the Company's officers or other employees (Tr. 69, 73, 90, 91). The Chief in turn receives his instructions from the army officers (Tr. 59, 63, 79). All members of the guard force are subject to the Articles of War (Exh. Company 9, Tr. 60) and may be court-martialed or otherwise punished for violations thereof (Exh. Company 10, Tr. 62). Their work is controlled by the General Orders issued by army officers (Exhs. Company 10, 11, 12, Tr. 62).

Discharge of Plant Guards. Dismissal of a plant guard requires the written approval of the army officer in charge (Exh. Company 10) and the Company does not have authority to discharge a plant guard permanently (Tr. 58). Upon termination of a plant guard's employment the army awards him a "Certificate of Meritorious Conduct" (Exh. Company 7, Tr. 57) unless he is discharged for misconduct, in which event only a formal release from his agreement with the United States Government is issued (Exh. Company 8, Tr. 58).

If the Board in its Decision and Direction of Election had included the facts established by the record and set forth above, it would have been unable to conclude, as it did, "that the relationship of employer and employee still exists" or ever did exist between the auxiliary military police and the Company. The interpretation of the National Labor Relations Act in this respect was recently considered by the Ninth Circuit Court of Appeals in *Hearst Publications, Inc. et al.* v. *NLRB* (June 10, 1943), 7 Labor Cases par. 61,659 (Cert. applied for, U. S. Supreme Court, Sept. 9, 1943 and granted Oct. 25, 1943). Judge Stephens held that the term "employee" should be given its ordinary and conventional meaning as developed under the common law and statutory enactments. The following language from the opinion is significant:

> "Since the term 'employee' is not defined in the Act, we agree with petitioners' contention that it must be given its conventional meaning as developed under the common law and statutory enactments. Such a result is in accord with the basic theory of statutory interpretation that the legislature is presumed to use words in their ordinary sense unless that sense is con-

tradicted by the context of a statute. *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 560; *Kepner* v. *United States*, 195 U. S. 100, 124; *Levy's Lessee* v. *M'Cartee*, 10 U. S. 47, 49; *Commissioner* v. *Plestcheef* (CCA 9), 100 Fed. (2d) 62, 64. Since the principle is a long established one, it would seem that if Congress had intended to enlarge upon the common meaning of 'employee,' it would have specifically so stated in the Act, which sets out specific definitions to several terms used in the Act.

• • • • •

"The term 'employee' has been interpreted under several federal statutes, other than the National Labor Relations Act, in like manner based upon a broad policy of public benefit. In connection with the Federal Employers Liability Act (45 USCA § 51) the Supreme Court stated:

> 'We are of the opinion that Congress used the words "employee" and "employed" in the statute in their natural sense, and intended to describe the conventional relation of employer and employee.'

Robinson v. *Baltimore & Ohio Rr. Co.*, 237 U. S. 84, 94. In accord: *Hull* v. *Philadelphia & Reading Ry. Co.*, 252 U. S. 475, 479. In connection with the Social Security Act (42 USCA § 1004) this court asserted:

> 'However, in defining the required relationship, and in drawing the distinctions between an employee and an independent contractor, the regulations (defining an employee as one who is subject to the control of his employer with respect to what shall be done and as to how it shall be done) do no more than reiterate the familiar principles of the common law.'

Anglim v. *Empire Star Mines Co.* (CCA 9), 129 Fed. (2d) 914, 917. In accord: *Jones* v. *Goodson* (CCA 10), 121 Fed. (2d) 176; *Texas Co.* v. *Higgins* (CCA 2), 118 Fed. (2d) 636. A similar result was reached in connection with the Merchant Marine Act (46 USCA § 688), *Loe* v. *Goldstein* (CCA 9), 101 Fed. (2d) 967, and with the Federal Safety Appliance Act (45 USCA

§ 11), *Stevenson* v. *Lake Terminal R. Co.* (CCA 6), 42 Fed. (2d) 357.

* * * * *

"The question for decision as to each newspaper separate from any other paper is whether there is substantial evidence that the publisher exercises, or has the right to exercise, sufficient control over the activities of the newsboys defined in its appropriate unit to support the Board's decision that they were employees under § 2 (3) of the National Labor Relations Act."

Under the rule set forth in the *Hearst Publications Case*, the question for decision in this proceeding is whether there is substantial evidence in the record that the Company exercises, or has the right to exercise, sufficient control over the activities of the plant guards to support the Board's decision that they were employees under § 2(3) of the National Labor Relations Act. The Decision and Direction of Election of the Board refers to no such evidence and in truth there is none. On the contrary the record affirmatively shows that the Company does not hire the plant guards, cannot control or supervise their work and does not discharge them.

The Board in its Decision and Direction of Election relied on its former decisions in *Matter of Phelps Dodge Copper Products Corp.*, 41 N. L. R. B. 973 (June 15, 1942); *Matter of Chrysler Corporation, Highland Park Plant*, 44 N. L. R. B. 881 (October 7, 1942); and *Matter of Dravo Corporation*, 52 N. L. R. B. No. 12 (August 30, 1943). In the *Phelps Dodge Case* the company contended that the plant guards were a part of management, and therefore not employees within the meaning of the Act, a contention entirely different from the question presented in the present proceeding. The effect of the militarization of the plant guards on the employer-employee relationship was not discussed in the opinion. It is difficult to see, therefore, how this decision has any bearing on the present question of whether the Company has relinquished so much of its control over its plant guards to the Army that the relationship of employer and employee does not exist within the definition of those terms in the Act.

In the *Chrysler Case* the Board stated in its opinion:

> "The employer's right to discharge for cause remains. Hiring, compensation for services performed, and general working conditions remain matters to be adjusted between the employer and employees through the usual employment contract."

In the present case the record clearly shows that the Company may not discharge a plant guard but may only relieve him of his duty temporarily (Tr. 57, 58). Also, hiring is not a matter to be adjusted between the employer and employees since the army officers determine whether an applicant will be hired (Tr. 51, 95). General working conditions are determined by the plant guard Chief (Tr. 67, 70, 77) who is responsible to an army officer (Tr. 59, 63), not to the Company (Tr. 69, 73, 90). The employment contract which the plant guard signs is with the United States of America (Exh. Company 2, Tr. 25). In all these respects the situation in the present proceeding is different from that in the *Chrysler Case*, which accordingly has no application in the present proceeding.

In its Decision and Direction of Election the Board placed its principal reliance on the *Dravo Case*. In connection with the appropriate unit the union argued in that case that the fact the guards are sworn into reserve membership in the armed services was no reason for segregating them from other employees, whereas the company urged that this should prevent these employees from being represented by any union which represents any other category of personnel employed by the corporation. In deciding this *sole* issue the Board *incidentally* remarked that "the wages and duties of this group of personnel remained unchanged after their induction so that it is apparent that the proximate relationship of employer and employee still exists between the Company and the guards." The issue of whether the employee-employer relationship was present was thus not squarely presented or adequately considered. The finding of a "proximate relationship of employer and employee" is certainly not the interpretation of the Act contemplated by the Circuit Court of Appeals in the case of *Hearst Publications, Inc. et al.* v. *NLRB, supra.* And as

the Company pointed out in its original brief, it cannot reasonably be said in the present case that there has been no substantial change in the peculiar incidents and status of the relationship as result of supervision by the military authorities since the hiring, direction, supervision and discharge of the plant guards is no longer within the control of the Company but is handled by the army officers.

In conclusion, it is the contention of the Company that whether an employer-employee relationship exists under the National Labor Relations Act depends upon the common law meaning of those terms. *Hearst Publications, Inc. et al.* v. *NLRB, supra.* At common law the incidents of the employer-employee relationship were the hiring, control, and discharge of the employee by the employer. *Hearst Publications, Inc. et al.* v. *NLRB, supra; Bowman* v. *Pace Co.*, 119 F. (2d) 858 (CCA 5, 1941); *Williams* v. *United States*, 126 F. (2d) 129 (CCA 7, 1942); *Texas Co.* v. *Higgins* (CCA 2, 1941); *Mid-Continent Petroleum Corporation* v. *Vicars*, 47 N. E. (2d) 972 (Indiana Supreme Court, 1943). These cases are fully discussed in the Company's original brief. In the present case the employer-employee relationship between the Company and the plant guards does not exist because the army officers hire the plant guards, control and supervise their work, and determine when they shall be discharged.

Conclusion.

The Board should reconsider its Decision and Direction of Election dated October 19, 1943 and should dismiss the Petition of the International Association of Machinists for Investigation and Certification of Representatives of auxiliary military police.

Respectfully submitted,

Barnes, Hickam, Pantzer and Boyd,
Attorneys for E. C. Atkins and Company.

Kurt F. Pantzer,
Lewis D. Spencer,
Of Counsel.

Dated October 28, 1943.

Filed October 29, 1943.

1 THE UNITED STATES OF AMERICA.

BEFORE THE NATIONAL LABOR RELATIONS BOARD.

E. C. Atkins and Company,

and

International Association of Machinists, District 90, and Their Affiliate Local 1683, affiliated with the American Federation of Labor.

Case No. 9-C-1982.

815 Connecticut Ave. N. W.,
Washington, D. C.
May 11, 1944.

The above entitled matter came on for oral argument pursuant to notice at 10:30 a. m.

Before:

Gerard Reilly, Presiding.
John M. Houston, Member.

Appearances:

Kurt F. Pantzer, 1313 Merchants Bank Building, Indianapolis, Indiana, appearing on behalf of the Company.

L. O. Thomas, Machinists Building, Washington, D. C., appearing on behalf of the Union.

2 PROCEEDINGS.

Mr. Reilly: The Board will now hear oral argument in the E. C. Atkins and Company case, file No. 9-C-1982. The case is here on Respondent's exceptions to the Trial Examiner's Report. Mr. Pantzer, are you representing the Respondent?

ORAL ARGUMENT OF MR. KURT F. PANTZER.

Mr. Pantzer: If it please the Board, this case is here on exceptions filed to the Examiner's Report finding that the company is guilty of an unfair labor practice in failing to bargain with the Machinists Union who have been organized. The location in dispute in this case is therefore the Indianapolis location.

One of the plants is the South Illinois Street plant in which the company prior to the war manufactured principally saws. That plant is owned by the company. The other plant is the Fall Creek Ordnance plant, the land and buildings of which are owned by the government and then leased to the company in order to ensure production space for the manufacture of armor plate. The company has had pleasant relations with the unions representing its employes in the past, and we have, may it please the Board, repeatedly stated at the hearings, both in the representation case and the unfair labor practice case that we intend to have friendly relations with this union when, if and as this rather technical point which we are raising, and on which I understand the mind of the Board is fore-
3 closed, has been finally decided. Mr. Richardson, the organizer for the Machinists in Indianapolis is a grand person and no better counsel for the organization could be found.

Mr. Reilly: We have before us the same question that was raised in the representation case with regard to this unit of guards, and it is your position that this case is distinguishable in any respect from the Dravo case or the Yellow Truck & Motor Coach case or is it your position that those cases should be overruled?

Mr. Pantzer: Well, in the first place, may it please your Honor, we take the position that so far as the facts stated in your opinions in the Dravo case, the Phelps-Dodge case, the Aluminum case and the Truck case are concerned you have not considered, so far as the opinion goes, the facts which are pregnant in this record. In addition we claim that those cases should be overruled.

Mr. Reilly: Yes.

Mr. Pantzer: Now, we do not have available in Indianapolis records in those cases and I have never had one of my assistants come to Washington to examine them. I do not know whether they would be available for such an examination. Now, does that state our position clearly?

Mr. Reilly: I notice in your brief you rely also in part upon the Court of Appeals decision in the Hearst Publications case. You were aware that that decision was reversed recently by the Supreme Court?

Mr. Pantzer: Very much aware.

Mr. Reilly: Yes.

Mr. Pantzer: But we again feel that if it was a question of fact which was decided in the first case that there must be a question of fact decided in this case. The facts in the Hearst case are in fact so different from the facts in this case that except for the one ruling that this Board can *ex cathedra* find that the relationship of the employer-employe exists in fact and which at common law did not exist, the Hearst case has no application to this case. Now, we do, however, want a thorough reconsideration of the principles of agency law in this particular case to the extent that administrative expediency warrants it.

Now, we have had, at that plant, continuous friendly relations with other unions. We, for instance, have had a closed shop saw smiths union for 40 years, one of the oldest guild unions in Indianapolis. There are 59 saw smiths, additional apprentices and by an order of this Board entered a year and a half ago in another representation case, not to be confused with this case, it was held that the press-brake operators who help straighten armorplate belong within the jurisdiction of the saw smiths closed shop union, rather than the C. I. O. union shop union. The C. I. O. Union has been with us since 1937 and represents some 2,000 production employees in the two Indianapolis units and is, as I have stated, a union shop. In connection with our negotiations with both of those unions it was expressly agreed that watchmen would not be a part of the bargaining unit. Before we took on army work we had from four to six watchmen. When

we switched over to war contracts, first in the South Illinois Street plant and subsequently after the government had constructed and leased to us the Fall Creek Ordnance Plant, we were required to maintain 64 military police and pay their wages. The record shows that the government required us to pay their wages. That does not appear, as I read any one of the other cases, in your other records.

Now, that is the sole incident, the sole conventional incident, of the relationship between employer and employee that exists in this case.

Mr. Houston: Do I understand your position,—this is a little bit different to what Mr. Reilly asked you,—that these men you claim are under the jurisdiction of the War Department, and the only connection you had with them was to pay their wages?

Mr. Pantzer: That is right. And the only relationship upon which this Board can base a finding that the employer-employe relationship existed is that sole incident of wage pay. The wages are, as the record shows, as we brought out in our own testimony, paid by checks of E. C.
6 Atkins & Company; but as does not appear in the other records the clauses in our military contracts require us to maintain these auxiliary military police at our expense or we don't get the contracts and as the Chief of the Military Police explained on the stand we are required to pay those wages by the government. Now, no other incident of the employer-employe relationship exists here. The right to hire does not exist. The right to fire does not exist. The right to discipline does not exist. The right to instruct and to command obedience with respect of the details of carrying out a plant guard's work does not exist. The right to consider grievances on the part of plant guards does not exist. There is absolutely no right of seniority based on length of service. The right of promotion is inherent in the armed forces in Cincinnati, Ohio, as the record shows. The right of demotion springs from Cincinnati, Ohio. With the sole exception of the incident that technically the check comes from them, no other incident of the relationship of employer-employe as we know it at common law or under any other decision pursuant to

statute which can be called to attention exists in this case. In other words, if the Board finds upon the facts in this case that the employer-employe relationship exists it does decided violence to the facts, and understand, your Honors, I respect your other decisions. I have other clients in Indianapolis, for instance, organized by the Air Force. In the case of those clients the plant guards have never taken
7 the oath of office as a soldier in the Auxiliary Military Police. They are not subject to court martial. Their employment is finally made and their discharge is finally made by the employer and their wages are paid by the employer. Promotion may be made according to seniority or according to ability or according to any other arbitrary criteria that the employer desires to follow.

Mr. Houston: In your case, how are these men engaged, who engages them and who handles grievances, and are they promoted and who discharges them?

Mr. Pantzer: With respect to the most instances, sir, with respect to the method of hiring and firing,—hiring may be made in the first instance by the War Department as may firing; but generally hiring is in the first instance initiated by the employer. No one of the 64 plant guards was ever an employe of the company before the taking on of war work and the signing of the contracts with the government to maintain the Auxiliary Military Police as watchmen for the government in the plant.

The application for employment is signed in the Personnel Office of the company. It is then forwarded and the man is put to work on probation. The application is then forwarded to Cincinnati and an F. B. I. man investigates the record of the employe thoroughly and finally after an investigation made upon that recommendation of hiring by the Personnel Director, the man is either engaged
8 or dismissed. If he is engaged he then signs the contract with the government which also existed in the Aluminum case, swears the oath of office to support the military and to be governed by the Army Regulations, and is issued his commission in the Military Police, a photostatic copy of which is in the record. He is issued his identification card signed by the Major in Cincinnati, not

an identification card signed by the Personnel Department of the Atkins Company, and is solely subject to the rules and regulations of the police.

Now, in that respect, Mr. Thomas, your Mr. Gann who went on the stand first, bore out our contention just as completely as our witnesses did.

I want to call the attention of the Board to the one possible misunderstanding in the record. The Union's witness, Mr. Gann said that with respect to general orders for performing work, the orders of the military in Cincinnati were paramount but with respect to special orders for performing work the order of the "company," were paramount. We were amazed at that testimony. It developed on cross-examination that what he meant was the "military company of military police" which has a Lieutenant Scanlon in charge of it in Indianapolis. So the first two or three times you come across the word "company" in the record don't be misled by coming to the conclusion that that means the employer. It means the Military Police Company as his cross-examination amply shows.

Now, with respect to firing, a recommendation from the company will also be considered but final firing is done from Cincinnati either by means of an Honorable Discharge Certificate which you will find in the record, or a Dismissal for Cause which is not a certificate but a more informal document, something like a letter, a copy of which you will also find in the record.

Mr. Reilly: I can understand, of course, why the company could not sever their military status, if that should be required by reason of this oath, but suppose that there was some guard whose conduct and character was so flagrant that they wouldn't want to have him around the plant and while it is true the company's action, as I say, wouldn't sever his military status, wouldn't it effectively terminate any connection he had with that plant?

Mr. Pantzer: Well, I am coming to that. You are bringing up the one sore spot, my one complaint about the two hearings. I received the most courteous consideration of Trial Examiner Shroyer in the first case and Trial Examiner Persons in the second case, the Unfair Labor Practice case, except that both of them denied my request for

subpoenas duces tecum to have the union, which is a local, organizing not merely the Atkins plant but a union organizing as well the Marmon-Herrington plant, the Curtis-
10 Wright plant, the Mertz Engineering plant and I believe one other plant (a tool and die manufacturing company plant)—to have the union bring into the hearing its existing collective bargaining agreement with those four plants in order that we might show that the nature of the union relationship ran completely counter to the relationship imposed by the military authorities in Cincinnati upon our plant guards. Now, the only way in which I can show to your Honors that the relationship could not exist,—and I think it was to that your question was directed,—am I right?—

Mr. Reilly: That is right, yes.

Mr. Pantzer: —If we read from the proposed collective bargaining agreement submitted by the union,—now, I am not going to read it at length. Let me merely summarize certain of the clauses and your assistant can then see whether or not my statements are honest.

Mr. Thomas: Is that an exhibit in the case?

Mr. Pantzer: That is an exhibit in the case. In other words, Mr. Richardson, the record shows submitted to us a proposal for collective bargaining a copy of which I have in my hand and that's an exhibit in the unfair labor practice case. I do not have the number but I know you can find that, Mr. Thomas.

In the first place, the union asks for a union shop effective on 30 days after employment and demands thereafter that we dismiss non-members. We have no power to
11 dismiss these employes, from our services,—any employes who have not joined the union. Now, you may say that possibly we could have negotiated so as to avoid a union shop, but Mr. Richardson, the union organizer, testified that three of the four plants under his organization had union or closed shop contracts. In the second place, the proposal specifies: "It shall be the duty of the shift committeeman to take up with the proper company officer grievances or suggestions from employes on his shift or crew," and also states that representatives of District No. 90 and the International Union may be present at all,—

"at any or all of the meetings for the purpose of collective bargaining or the handling of grievance matters." That is almost the situation in the Russian Army but not yet the situation in the American Army. In other words, the testimony shows that the Army has the absolute right to discipline those employes. There isn't any question about it in the record. Now, whatever the facts may be, Sir, in your Aluminum Company record, or in your other records, or in the Hearst case with respect to denying a newsboy or denying a plant guard, respectively, the right to work, the company doesn't have it. That inheres in the military authority and we have no right to make a contract binding the military authorities in that respect. You can understand how that would completely destroy military discipline.

Mr. Reilly: I notice the record indicates the disciplinary powers of the military officials with regard to these
12 men. I thought there might be concurrent power on the part of the company but you feel that the record doesn't lend any support to that theory?

Mr. Pantzer: I do not, except in an advisory manner with respect to hiring and firing. There is no finding that there is any advisory authority on the part of the company to promote employes, to demote employes. Those promotions and demotions came from Cincinnati or were made by the Chief of the Military Police on the spot, without any consultation whatever with the Personnel Department of the company.

Mr. Houston: On grievances, do they take that up with the Personnel Department of the company?

Mr. Pantzer: They have no grievances in the army. You are lucky if you get to salute your company commander, and the record so shows. In other words, if the Army is wrong it's right. There is no National Labor Relations Act unfortunately, in the Army. I was in the last war and I think there should be some sort of grievance procedure but not the Russian kind.

Mr. Reilly: Then it is your position that these men are employes of the War Department? Is that correct? Did you read in the Dravo case that statement prepared jointly by the War and Navy Departments with regard to their views of the legal status of these armed guards?

Mr. Pantzer: In other words, that there may be collective bargaining?

13 Mr. Reilly: Yes. There is reference to it in the decision. I am not sure that it is set out in full. I remember it was included in an exhibit.

Mr. Pantzer: Now, Mr. Reilly, I hope that when that order is taken judicial knowledge of in this case, because it is not in the record—

Mr. Reilly: Yes, I understand that.

Mr. Pantzer: —That the Board will honestly put into the record the date of that order, because the date of that order is antecedent to the orders 1, 2, 3 and 4 which are in the record in this case, and your Dravo case was decided before this more thorough organization of the Auxiliary Military Police under the Ordnance Department, not the Aircraft Department, the Lease Lend Department or the Navy Department, in Cincinnati, through its Civilian Security Service headed up by a major and captains and lieutenants.

Mr. Reilly: Your feeling is that even though your earlier arrangement made by the Army and Navy may have been such as to retain the relationship of employer-employe with regard to these men so far as companies were concerned that the arrangements they made in Indianapolis were so different that we have got to examine these documents alone and decide whether there is an employer-employe relationship?

Mr. Pantzer: Precisely.

14 I concede, your Honor, that perhaps the Dravo case may be right on its facts though none of the facts on my side of the case are noticed in the Dravo case, because the Dravo plant was not organized as our plant was. Consequently, that ruling of the War Department related to the rather loose supervision of plant guards who were nothing more than watchmen in the Dravo plant. In other words, I maintain that had the union sought to organize our six watchmen before the government took it over we would have had the Dravo case in the Atkins situation.

Mr. Reilly: Yes.

Mr. Pantzer: Now, going back to the contract you will note that the contract violates very clearly the orders which

are in evidence. It provides that rights to promotion, preferences as to shifts, and the right to remain in the service of the company in case of reduction in force, shall be governed by seniority. Now, it develops that the military authorities following the Manual of Guard Duty started an entirely different shift system with respect to these guards than we have in our plant. Our plant is run on fixed shifts. The year round a man works on the graveyard shift and doesn't rotate. These, according to the military service, rotated in eight hour tours of guard duty. Furthermore, you will find, as the record illustrates that the orders which they swore to carry out are identically the same, through order No. 12 of the orders of an
15 infantry soldier on guard duty under the Manual of Interior Guard Duty, photostatic copies of the proper pages of which are in evidence in this record.

Now, under that it would be absolutely impossible for the employer to promote or demote or give preference as to shift according to seniority. The Chief of the Military Police, may it please the Board, testified specifically that the right of promotion, the right of discipline, depended entirely upon the ability and performance of the man.

Mr. Houston: He determines that himself, doesn't he. I mean the chief?

Mr. Pantzer: The chief.

Mr. Houston: Yes.

Mr. Pantzer: The chief, who is frequently visited by Captain Westenall from Cincinnati and Lieutenant Scanlon from Indianapolis.

Mr. Houston: Yes, I understand that, but no member of the company has any voice in the matter?

Mr. Pantzer: No member of the company. The testimony was uncontradicted that these police have the right to arrest officers of the company, to discipline officers of the company, to keep them from walking around in their own plants. This was entirely under the jurisdiction of the military authorities. And this contract provides that "the management of the plant and the direction of the work-
16 ing forces, including the right to hire, suspend or discharge for proper cause, or transfer and the right to relieve employes from duty because of lack of work or

other legitimate reasons is vested exclusively in the company." I assume that some of those other contracts were like that, and they may be plants which were under the jurisdiction of the air force at the time the contracts were made, in which none of this military legerdemain (if the Board chooses to look at it as legerdemain, and it certain is not legerdemain) was enforced.

Now, I have taken up my half hour. I hope I have impressed the members of the Board with my sincerity in believing that the incidents of the employer-employe relationship, as those words are used in the statute, do not exist in this case except with respect to the sole technical incident that the pay actually comes from the company. But when you realize that the company is merely a conduit of that pay, made to pay it as a result of the contracts of the government (contracts which it was impossible to introduce in evidence because of the confidential nature of the product covered thereby). It will be seen that it is merely a technical incident and that in substance it is the government which is the paymaster of these troops.

Mr. Reilly: Just one more question. Are their wages fixed by some scale that appears in an Army manual or are they fixed by the company so far as any company has control of the situation under the regulations under the War Labor Board?

Mr. Pantzer: Will you ask that question again, please?

Mr. Reilly: Yes. In fixing the wage rates for the guards do you have to conform to some standards in the Army or War Department Manual?

Mr. Pantzer: The record shows that in fixing their original wage rates which as I understand have not been increased since, (and I interpolate now because the record doesn't show it but the wage rate of the saw smiths in the Saw Smiths Union and the C. I. O. employes in the C. I. O. Union has also not been changed for two and a half years, which well covers the period since when the Plant Guards came into the plant)—they were initially fixed by a Form 10 application addressed to the National War Labor Board and we put that evidence into the record.

Mr. Reilly: Yes.

Mr. Pantzer: In other words, we have been fair in presenting all the facts.

Mr. Houston: I don't know whether this is a relevant question or not but I want to ask it. Do you operate on a cost-plus basis on your contracts with the government?

Mr. Pantzer: No, we do not operate on a cost-plus basis. We have never been on that basis and the company is not in the best financial condition at this time for that reason.

It may interest you that a little later in the day I
18 am to discuss with representatives of the War Labor Board the matter of this steel base as it affects the Atkins Company.

Mr. Houston: Yes.

Mr. Pantzer: The 17 cent wage increase and the guaranteed weekly wage, and so forth. But that, of course, won't affect these plant guards because they are not in the C. I. O. Steel Workers Union.

Mr. Reilly: Mr. Thomas.

Oral Argument of Mr. L. O. Thomas.

Mr. Thomas: May it please the Board, I notice argument phases brought out by Respondent's attorney a repetition of arguments that are already in the record. I have not been able to distinguish anything new at all and I just want to leave this thought that even granting the assumption that the Army of the United States has made an exception in this one case and has special rules surrounding this one particular plant, that even so they have left certain matters which are the subject of collective bargaining and wages. If that were the only thing that were left it would still be a matter for collective bargaining and to that extent, at least, these individuals would be employes under the Act. The fact that the union made certain proposals as subjects for collective bargaining doesn't seem to me to be relevant at all in view of the fact that they are subject to collective bargaining and certainly if the company is precluded from arriving at a certain agree-
19 ment the union would have to recede from its particular position. Now, the fact that if this case is as

you would be inclined to believe, from the remarks of counsel, it is the only case in the country in which this particular situation exists, which the union doubts, then we would be very much interested in that. We have many contracts with concerns covering militarized guards who have to take an oath in the army, who have to submit to F. B. I. investigation and who are completely under the supervision of the army to the same extent they believe as the guards in this case.

Mr. Houston: And are still paid by the employer?

Mr. Thomas: And are still paid by the employer. And even in the record, the documentary arguments, the point isn't raised so fine as it is here today, removing the company from the control of this force in many respects. I didn't get out of the record and the pleadings that clear a distinction. I got the fact that many things were subject to the supervision of the military forces and I think that that is just and right. The company in the first place, however, entered into the agreement with the United States in which this was a clause. It was a voluntary proposition on the part of the company and I don't think that the military or the company, either one, can enter into a contract and deprive an individual of a right under an Act. These men are not part of the armed forces in the true sense of the word. They can be called out the same as any police official to subdue local riot or something like that. So can a guard with a deputy sheriff's badge so they are not subject to call to any foreign service. They haven't obligated themselves to be called to a training ground and shoulder a rifle. They have obligated themselves to watch this plant and to follow the military rules that are set up for that purpose. And I can't believe, nor do I think the Board can believe, that the military is any more concerned about the guarding of that particular plant than it is the large aircraft plants throughout the country.

Mr. Houston: Is there any distinction between these particular guards in this plant and any other militarized or aircraft factory?

Mr. Thomas: Not to the Union's knowledge. That, of course, as a matter of fact would have to be established

from the record but to the Union it seems unique that there should only be one place in the country where they cease to be employes when they are considered by the army which has already issued regulations to that effect, stating wherein it is possible for those people to bargain collectively. The only requirement that they make is that they not be a party or part of the same lodge that the production and maintenance employes are, that they have a separate union of their own, all of which has been carried out meticulously in this case as counsel's remarks would indicate. There is a Guards Lodge in the City of Indianapolis. Nobody is eligible to it except those
21 who are guards. I don't know whether it is in the record or not, but I make the statement and we are willing to substantiate it with exhibits, to the effect that we have contracts, plenty of them, covering militarized guards. Now, the rest of it probably would be the same as my colleague, Huhndorff, I agree whole-heartedly with—

The Chairman: Do you have any more?

Mr. Thomas: I should like to say one sentence. I should like to ask of the Board that it take judicial knowledge of any public records which it has in the form of directions and decisions of election or orders in unfair labor practice cases with respect to the four or five other plants which this local Machinists Union has under organization in Indianapolis, in order to establish whether or not any contest of the existence of the employer-employe relationship was made by employers in those cases.

Mr. Reilly: Does the record indicate the names of those?

Mr. Thomas: Yes, I mentioned three of them just a moment ago.

Mr. Reilly: Then we can check them.

Mr. Thomas: Check them against your record and find out whether any contests were made. I understand that consent elections were held in those cases or recognition made without even an election.

22 Now, I have been unable to run the cases down in my services in Indianapolis. I have found nothing which runs counter to my statements. I therefore ask you to take judicial knowledge and if you find any facts that

run counter to my observations—I am not stating them as a matter of fact because I don't know the ultimate facts,—but you cite them in your opinion.

Mr. Reilly: Yes.

Mr. Thomas: There is a standard clause that takes care of any army regulation as they affect a collective bargaining agreement. In other words, it says if there are any army regulations to the contrary they are controlling. If Mr. Pantzer would give the dates of these orders that counsel was curious about.

Mr. Pantzer: Well, let me be fair to Mr. Thomas, who is not conversant with the record. In the proposal of the union, Mr. Thomas, from which I read just a few minutes ago—

Mr. Thomas: That is in the record.

Mr. Pantzer: —in my direct statement,—appears an Article Numbered VIII bearing the heading 'War Department Regulations' reading as follows: "It is understood that for the duration of the war this agreement is in all respects subject to the provisions of the directives of the War Department concerning military organizations of the plant guard forces, W. D. Directive, July 2, 1942, A. G. 23 231.43; 808 circular (blank) 1942, and any amendments thereto, and that nothing contained in this agreement shall be construed in any way to interfere with the organization, efficiency, training and control by the War Department of the company guard force as an auxiliary to the Military Police nor to abrogate or interfere with the duties, responsibilities and rights imposed by the War Department upon any employe in such Auxiliary Military Police." You might as well not have a collective bargaining agreement with the proposals which I read in my direct statement as have that in the agreement. That is not collective bargaining if it means what it says. But I call attention to the dates of those orders which antedate by substantially a year the new system set up by the government with respect to the Auxiliary Military Police from Cincinnati out.

Mr. Reilly: Thank you.

Mr. Pantzer: The order to which I refer is dated May 10, 1943.

Mr. Reilly: Would you show the document to Mr. Pantzer and see if he has any objection to it. (Handed over to him.)

Mr. Pantzer: I have never seen this document. May I have a moment's time to consider it?

Mr. Reilly: Yes, indeed.

(Discussion off the record.)

Mr. Pantzer: I have glanced through the document which was handed me by Mr. Thomas and find it is a con-
24 formed copy of a collective bargaining agreement entered into between the Aircraft Accessories Corporation, Kansas City Division, including Slater, Missouri, and the Auxiliary Military Police and Guards Union, a subdivision of the International Association of Machinists. I have glanced through the various provisions therein contained and I should say ninety percent of them are entirely out of consonance with the material contained in the military order from Cincinnati. Now, it was a denial of my request for subpoena that prevented me from showing how out of accord with military discipline these three or four or five other contracts of this union, actually imposed upon and signed by the employers, were.

May I leave this with the Board, or do you want it for your files?

Mr. Thomas: Well, I will furnish you copies.

Mr. Pantzer: If he would send copies to the Board and to me I think it would be illustrative rather than in defeat of the point I make.

Mr. Reilly: Yes. I take it that there is no objection to our receiving it, is that right?

Mr. Thomas: No.

Mr. Pantzer: I have no objection to the Board's receiving and making an exhibit of the document, provided that Mr. Thomas will send a copy to me.

Mr. Reilly: Yes. That is understood.

25 (Discussion off the record.)

Mr. Reilly: On the question of the relevance it would seem to me that the real question in this case is whether the orders and contracts of the government applicable to this company are such that the government can

determine that the control exercised over them by the company is so continuous as to indicate that the employer-employe relationship did not exist so that while the collective agreement which you offered is of interest it wouldn't necessarily have any bearing on this point since the argument seems to be confined—

Mr. Pantzer: I think you were about to suggest, Mr. Reilly, that if it is made an exhibit I get to see it.

Mr. Reilly: Oh, yes, indeed.

Mr. Pantzer: And I want to call attention to the fact that it is a contract very obviously with an aircraft producing firm and none of the aircraft producing firms in our area, including Curtiss-Wright and so forth have had the military regulations enforced. Even today, in May 1944 that is so.

Mr. Reilly: Thank you, Gentlemen.

(Whereupon the oral argument was closed.)

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the twenty-eighth day of September, in the year of our Lord one thousand nine hundred and forty-three and of our Independence, the one hundred and sixty-eighth.

8669

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

E. C. ATKINS AND COMPANY, RESPONDENT

On Petition for Enforcement Of an Order of the National Labor Relations Board

And, to wit: On the twenty-seventh day of February, 1945, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said opinion is in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Seventh District

No. 8669. January Term, 1945, October Session, 1944

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

E. C. ATKINS AND COMPANY, RESPONDENT

On Petition for Enforcement Of an Order of the National Labor Relations Board

February 27, 1945

Before SPARKS, MAJOR and KERNER, Circuit Judges

MAJOR, Circuit Judge: This case is here on petition of the National Labor Relations Board for enforcement of its order issued May 30, 1944 against respondent, pursuant to Sec. 10 (c) of the National Labor Relations Act. The Board, upon a charge filed by the International Association of Machinists, District 90, and its affiliate Local 1683 (hereinafter called the Union), issued

its complaint charging that respondent had violated Sec. 8 (5) and (1) of the Act. In its answer to the Board's complaint, respondent admitted that it had refused to bargain collectively with the Union, as alleged in the complaint, but urged that members of the unit for whom the Union sought to bargain were not employes of respondent within the meaning of the Act, and that consequently its refusal to bargain did not constitute a violation. The Board decided adversely to respondent and entered its cease and desist order now sought to be enforced.

No evidence was offered by either of the parties at the hearing on the unfair labor practice charge; however, it was stipulated that the evidence which had heretofore been offered in a representation proceeding should be considered. In this latter proceeding, instituted by the Union on October 19, 1943, it was determined by the Board that the militarized plant guards at respondent's plants were employes within the meaning of the Act and that, excluding certain supervisory employes, they constituted an appropriate bargaining unit within the meaning of Sec. 9 of the Act. The Board accordingly directed that an election be held among the employes in said unit. Following the election, the Board on November 29, 1943, certified the Union as the exclusive bargaining representative for such employes.

The primary issue now presented, stripped of all camouflage, is whether the members of the unit for whom the Union sought to bargain were employes of respondent within the meaning of Sec. 2 (2) and (3) of the Act. It is also contended by respondent that even though the position of the Board be sustained in this respect, its order should not be enforced, on the ground that its enforcement would not effectuate the policies of the Act.

Respondent urgently insists that the findings of the Board are insufficient to support its order, and particularly that at no time has the Board made a specific finding on the issue as to whether the members of the bargaining unit are its employes within the meaning of the Act. While there is some merit in this criticism, it cannot be doubted but that the Board determined such issue adversely to respondent and that respondent was aware of such determination. Respondent also contends that the Board was without authority in the unfair labor practice case to make findings in addition to those made in the representation case. It is true, as already stated, that no additional evidence was offered in the latter case but, nevertheless, we are of the view that the Board, with the record of both proceedings before it, had a right to make such further findings as it deemed appropriate.

We are of the view, also, that the findings contained in its decision in the unfair labor practice case, if substantially supported, are sufficient to support its order. In studying this record for the

purpose of ascertaining if such support is present, we are not unmindful of the admonition so often repeated that a court is not permitted to weigh the evidence and substitute its judgment for that of the Board. As stated in the recent case of National Labor Relations Board v. Hearst Publication, Inc., 322 U. S. 111, 130:

"Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record."

The Hearst case is strongly relied upon by the Board. It is true that the issue there decided, that is, whether the members of the unit which sought the right to bargain were employes within the meaning of the Act, was the same as the issue in the instant case. The facts of that case, however, are so widely different from those of the instant case that it is of little, if any, assistance here. It is pertinent to note that the court was particular to point out in detail the vast amount of control which the publisher had over the newsboys in question. The court also recognized that many forms of service relationship are not within the meaning of the Act. It stated (page 126):

"Large numbers will fall clearly on one side or on the other, by whatever test may be applied. But intermediate there will be many, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight. And consequently the legal pendulum, for purposes of applying the statute, may swing one way or the other, depending upon the weight of this balance and its relation to the special purpose at hand."

Therefore, we are of the view that the decision in the Hearst case requires rather than precludes a review of the facts in the instant case, with a view of ascertaining if they reasonably support the Board's order. Furthermore, we are of the view that common-law tests are not to be ignored, although not exclusively controlling, and that any test utilized must be consistent with the purposes of the Act.

Respondent is a corporation operating two plants in Indianapolis, Indiana. One of such plants (referred to as the Main Plant) has been owned and operated by respondent since 1857; the other (referred to as Fall Creek Ordnance Plant) is owned by the federal government and was constructed for war purposes. Respondent operates the latter under a lease from the federal government, the terms and conditions of which are confidential for military reasons. The latter is a military reservation, and the Main Plant is listed by the government as a restricted area under government supervision.

Since 1941, respondent has been engaged exclusively in the manufacture of armor plate for the federal government. Prior

thereto, it was engaged in the production of saws and saw tools at the Main Plant. At that time respondent had as its employes some fifty-nine sawsmiths who for a period of over forty years had been organized by and were members of the Sawsmiths Federal Labor Union No. 18548 (sometimes referred to as the Federal Local), and 1,208 production and maintenance employes who had since 1937 been members of United Steel Workers of America, Local 1543, affiliated with the C. I. O. (sometimes referred to as the C. I. O. Local). Respondent also had four employes, designated as watchmen, who were not members of any Union. Two of these employes worked on the night shift and two on the day shift. The duties of the former were to check the eighty-two night clocks in the plant, and those of the latter to watch or guard the gates of the plant. These four jobs were known as "pensioners' jobs."

The authority for the establishment of a plant guard system flows from Executive Order 8972, issued by the President of the United States on December 12, 1941. The order is entitled: "Authorizing The Secretary Of War And The Secretary Of The Navy To Establish And Maintain Military Guard And Patrols, And To Take Other Appropriate Measures, To Protect Certain National-Defense Material, Premises, And Utilities From Injury Or Destruction." The resolution, after reciting the situation pertaining to the crisis confronting the government as a result of war, states:

"Therefore, by virtue of the authority vested in me as President of the United States, and Commander-in-Chief of the Army and Navy of the United States, I hereby authorize and direct the Secretary of War, whenever he deems such action to be necessary or desirable, * * * to establish and maintain military guards and patrols, and to take other appropriate measures, to protect from injury or destruction national-defense material, national-defense premises, and national-defense utilities * * *."

It is to be noted that the purpose for which a plant guard system was to be inaugurated is clearly stated in this executive proclamation.

In conformity with such order, there was issued by the War Department under date of July 2, 1942, a proclamation entitled "Military Organization of Plant Guard Forces," which provided in part:

"Guard forces at all War Department plants * * * are to be organized, drilled and instructed as military units subject to the Articles of War.

"These guard forces will be organized as a civilian auxiliary to the Military Police in all ammunition plants and plants where the possibility of sabotage is greatest * * *.

"At the time any guard force is organized as a civilian auxiliary to the Military Police, the commanding officer having jurdisdiction over the guard force will:

"a. Cause the Articles of War prescribed by Article 110 thereof to be read and explained to each member of the guard force;

"b. Issue orders and regulations setting forth the duties and responsibilities of the guard force;

"c. Organize each guard force with a member of the Army of the United States in command and cause each force to be drilled and instructed with a view to supplementing the Army in resisting attack on war material, war premises, and war utilities which the force is assigned to guard.

"d. Require each member of the guard force to give a pledge of loyalty to the United States, and to execute an agreement acknowledging that such Articles of War are understood by him and that he is subjected to military law as long as he remains a member of the guard force. (A draft of a form of such agreement is attached.)"

The form of agreement is entitled, "Agreement between the United States of America and _____"

(Plant Guard)

The proposed agreement states that the government is approving the employment of guards "for the purpose of guarding and protecting war material, war premises and war utilities from injury or destruction by the enemy or otherwise, including the making of arrests, as peace officers for violations of Federal laws, as well as for violations of orders and regulations issued by military authority." The proposed agreement then provides:

"Now, therefore, I, _____, who have been or am about to be employed by _____ as a guard at _____ for the purpose of guarding certain war material, war premises, and war utilities, in consideration of my employment or the continuation of my employment, do agree with the United States of America that:

"(1) I will support and defend the Constitution of the United States against all enemies, foreign and domestic;

"(2) I will bear true faith and allegiance to the Constitution of the United States;

"(3) I will well and faithfully discharge my duty as a civilian auxiliary to the military police to protect war material, war premises, and war utilities against all enemies, foreign and domestic, and will obey any orders issued in connection therewith by the President, as Commander-in-Chief of the Army and Navy of the United States, and by his duly authorized officers;

"(4) I acknowledge that the appropriate Articles of War have been read and explained to me, and that in the performance of

my duty to protect such war material, war premises, and war utilities, I am subject to military law during the period of my employment.

_____"

(Signature of Plant Guard)

At the time respondent entered into its relationship with the federal government for the manufacture of armor plate (the record does not disclose the exact date but it was sometime in 1941), representatives from the Cincinnati Ordnance Office of the United States Army made a survey of respondent's plant facilities and prescribed the requirements of the government relative to protection. As soon as contracts for the production of war goods were entered into between the Army and respondent, a clause was inserted, stating, "Unless proper protection of government property is provided, in compliance with certain directives, the contract will be cancelled." It was in compliance with this requirement that respondent entered into a relation with those whom the Board has found to be its employes. A staff of sixty-four plant guards was installed, of which thirty-two were stationed at the Main Plant and thirty-two at the Fall Creek Ordnance Plant. As heretofore stated, respondent had theretofore employed only four watchmen, and with the exception of these four, none of the sixty-four persons installed as plant guards had previously been engaged in the service of respondent.

In Cincinnati, the War Department maintained a Continuous Security District Office, headed by A. C. Rasmussen, Lieutenant Colonel, Ordnance Department, as District Chief, and B. R. Wetenhall, Captain, Corps of Military Police, District Plant Guard Officer. There was no local resident Commanding Officer for the two plants of respondent, but such plants were included in a "group of plants" for which Lieutenant Scanlon of the Corps of Military Police was the Plant Guard Officer. Headquarters were maintained by him in Indianapolis for the training and discipline of plant guards of respondent, as well as those of other plants in a certain jurisdiction. At the Main Plant, the guards were in charge of Chief Johnston, and at the Ordnance Plant in charge of Chief Hann. Under each of these Chiefs were four guards designated as Lieutenants. Of these two Chiefs and eight Lieutenants, none were Army men.

In addition to Executive Order 8972 and the War Department's proclamation of July 2, 1942, heretofore quoted, there were issued by the War Department or some representative thereof a number of documents relative to the duties, obligations and rights of the members of the plant guard force. These documents in some respects also attempted to fix the obligations and rights of respondent.

Included in such documents is a War Department directive of March 17, 1943, referred to as Circular No. 15,[1] and "Plant Protection Data Binder" dated June 7, 1943, issued by the Continuous Security District Office of the War Department at Cincinnati. Other material documents include guard orders Nos. 1, 2 and 5, issued by the Cincinnati Office on May 10, 11 and 12, 1943, respectively.

Four witnesses were heard by the Board, namely, Gann and Richardson presented by the Union in the representation proceeding, and Johnston and Wood who testified in behalf of respondent. Johnston was Chief of the plant guard force, and Wood was respondent's personnel manager. In fact, the entire proof as to the relation which actually existed between the plant guard employes and respondent was furnished by these witnesses.

We shall now examine the Board's findings, upon which its order is predicated. It first quotes the first paragraph of the agreement (heretofore quoted in full), in which the guard recites: "* * * I, ----------, who have been or am about to be employed by ---------- as a guard at ----------* * *." There is nothing, however, in the Board's decision or findings as to what, if any, importance it attaches to the statement just quoted. Moreover, it would appear that this self-assertion would not constitute proof against respondent when contained in an agreement to which it was not a party. It is also pertinent to note that this form of agreement was furnished by the government and that an applicant could not obtain a guard position until it was signed. The "Plant Protection Data Binder," issued June 7, 1943 by the Cincinnati Office, provided: "If a guard refuses to sign the agreement he may (but need not) be temporarily retained with the understanding that he will be dismissed as soon as he is replaced, and in any event within a reasonable time." It is significant, and this the Board omitted to mention in its decision, that the plant guard in this agreement pledged his allegiance to the government and stated: "I will well and faithfully discharge my duty as a civilian auxiliary to the military police to protect war material, war premises, and war utilities * * * and will obey any orders issued in connection therewith by the President, as Commander-in-Chief * * * and by his duly authorized officers." It is further significant that in this agreement no mention is made of any allegiance owed to respondent, or any obligation to take orders therefrom.

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[1] Circular No. 15 has been printed by the Board as a supplement to its brief. It was not introduced in evidence, and respondent contends that it cannot be considered as proof in support of the Board's order. It is a public document of which, so we think, a court may take judicial notice. Standard Oil Co. v. Johnson, 316 U. S. 481, 483.

The material findings upon which the Board's order must rest are:

"The record shows that the guards are interviewed for employment by the respondent and not by the United States of America, and are hired by the respondent; that their discharge is ordinarily initiated by the respondent; and that during their employment they are paid by the respondent, at rates set by the respondent and not by the United States of America. According to Chief Guard Henry A. Johnston, a witness called by the respondent in the hearing in the representation case, he is in command of all the guards at one of the plants and works 'very closely' and 'cooperates' with the respondent's representatives. Moreover, Johnston admitted that the respondent could temporarily suspend a guard from duty. Cyrus E. Wood, the respondent's personnel director, who corroborated Johnston's testimony as related above, referred to the guards at the plants involved as the respondent's employees, and further testified that the respondent makes the 'necessary pay roll deductions' before paying them their wages.

"* * * It is true that for reasons of national security the respondent may have surrendered to the military authorities many of the attributes of control which it would normally possess over its plant guards. It is clear, however, that the respondent still retains a sufficient residual measure of control over the terms and conditions of employment of the guards so that the guards should not be deprived of the rights guaranteed in the Act."

It is important in this connection to note the test which the Board utilized as a basis for its finding of the existence of the employer-employe relationship. The test includes four incidents: (1) the guards were paid by respondent; (2) they were hired by respondent; (3) they could be discharged by respondent; and (4) the control exercised by respondent.

The incident most strongly emphasized is that they were paid by respondent. Undoubtedly, this is the most important incident common to the employer-employe relationship. In the instant case, however, it is, when viewed in connection with the attending circumstances, largely minimized if not entirely obliterated. Payment of these guards by respondent, in fact their employment, was a requirement imposed by the government as a prerequisite to respondent's right to engage in the manufacture of war material. It had no optiton to pay or not pay; neither did it have any option to employ or not employ. Chief Johnston, when asked why the guards were paid by respondent when their orders were received from the military authorities, stated an incontrovertible fact: "They pay because the government makes them pay." It must be assumed, so we think, that respondent was reimbursed

by the government for all costs incurred in the manufacture of war material, including that of compensation paid to the guards. In reality, under such circumstances, as bearing upon the employer-employe relationship, we are of the view that it makes no difference whether they were paid by respondent or by the government.

It is also well to keep in mind that this guard force was born of the exigencies of war. None of them (with the exception of the four original watchmen) had theretofore been employed at respondent's plant. They were employed at the command of the government and the purpose of their employment was, as stated in the President's proclamation, "to protect from injury or destruction national-defense material, national-defense premises, and national-defense utilities," or, as stated in the agreement which the plant guard was required to sign with the government, "to protect war material, war premises, and war utilities against all enemies, foreign and domestic." In "Plant Protecton Data Binder" dated June 7, 1943, the mission of a guard force is stated to be twofold: (a) "to provide interior and exterior protection of the plant against sabotage and espionage and natural hazards," and (b) "to serve with the Army in providing the protection to the plant and its environs in emergency situations." Again, it is stated in this Binder, "The auxiliary military police are supplementing the Army of the United States in a vital task of protecting war material and war production facilities." It appears certain not only that they were employed at the command of the government but that the services rendered by them were for the benefit of the government and the war effort. Any benefit accruing to respondent from their services was purely incidental to the primary purpose of their employment. Reliance upon payment under such circumstances is to embrace form and to ignore the realities of the situation.

The Board's finding that the guards "are hired by the respondent; that their discharge is ordinarily initiated by the respondent" is deceptive and, we think, without substantial support. It is true, as the Board found, that the guards "are interviewed for employment by the respondent." This is done by respondent's personnel officer when the applicant is required to fill out an application blank. This service on the part of respondent is also required by the government. At the time the application for employment is made, the applicant is expressly told: "It will not be effective without the approval of the United States government." True, after the application form had been executed, it was the custom temporarily to assign the applicant to plant control work. In the meantime, he was required by the government to sign the agreement with it, as heretofore related. This agreement stated: "The

United States is approving the employment * * *." Also, as heretofore suggested, if he refused to sign this agreement, he never became a member of the military police and his dismissal was required within a reasonable time.

The application and agreement were then transmitted to the military authorities at Cincinnati and such authorities made an investigation as to the capacity, integrity and patriotism of the applicant. Such authorities had the entire responsibility of determining the applicant's fitness, even to the extent of his physical fitness. If he was accepted by the military authorities, the signed agreement with the government was returned to the applicant, together with a Plant Guard Identification Card executed by Captain Wetenhall, District Plant Guard Officer.

This card certifies: "_____ has been voluntarily and duly enrolled as an Auxiliary to the Military Police for service with the Army of the United States at _____ and is subject to Military Law for the duration of the War or until the earlier official termination by the War Department of his services as an Auxiliary to the Military Police." It is pertinent to note that this identification card which constitutes the guard's authority states in no uncertain terms that he has been enrolled "for service with the Army of the United States at _____," and, further, that he is subject "to Military Law for the duration of the War or until the earlier official termination by the War Department." Certainly this badge of authority contains not the slightest indication that the guard has been employed, hired or can be discharged by respondent.

The applicant is also furnished with the "Certificate of Enrollment," also signed by Captain Wetenhall. The phraseology of this certificate is the same as that of the identification card. There appears in the record one of these certificates in its executed form.[2]

Upon receiving the documents just referred to, the applicant is inducted by taking the oath of allegiance to the United States and the military. This oath includes an obligation to be subject to the

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[2]

United States of America

AUXILIARY MILITARY POLICE

Army of the United States

CERTIFICATE OF ENROLLMENT

This is to certify that Henry Adams Johnston has been voluntarily and duly enrolled as an Auxiliary to the Military Police with the rank of_____ for service with the Army of the United States at E. C. Atkins & Company, Indianapolis, Indiana, and is subject to Military Law for the duration of the War or until the earlier official termination by the War Department of his services as an Auxiliary to the Military Police. For the Commanding General, Fifth Service Command: Dated 29 June 1943.

Official:
B. E. WETENHALL,
Plant Guard Officer.

A. C. RASMUSSEN.

Articles of War. Any doubt as to when employment as a member of the military police commences is dispelled by a provision in guard order No. 3, which states: "Service will begin with the date that the plant guard was inducted * * *."

Plant Protection Data Binder dated June 7, 1943 provides:

"Each plant guard who becomes a member of the Auxiliary Military Police continues as such until he is released by the War Department from his obligations. This will take place when competent military authority has approved of his dismissal or resignation or when he has been discharged without honor."

Again, it is provided in this same Binder:

"Basically the militarization of the plant guard forces does not change the existing systems of hiring, compensation, and dismissal except as stated in paragraph 25."

Paragraph 25 provides:

"A member of the Auxiliary Military Police may not be employed, dismissed, or may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant guard force would be impaired and declines to give his approval thereto. Inasmuch as the guards are under oath to the Army, the plant management may suspend a guard without pay pending approval of his dismissal by the District Plant Guard Officer and pending the termination of the guard's enrollment as a member of the Auxiliary Military Police."

From what we have shown, we think it is conclusively established that the authority to hire and discharge was solely the prerogative of the military. True, respondent was charged by the government with receiving the application for employment and in making a recommendation. This is the sole support, if it can be characterized as such, found in this record for the Board's finding that respondent was authorized to hire. Nor do we find any support for the Board's finding that "their discharge is ordinarily initiated by the respondent." The most which can be inferred is that respondent was permitted to recommend for discharge the same as it was required to recommend for hiring.

In making this analysis of respondent's right to hire and discharge, we must note the testimony of the witness Gann, which the Board stresses. It follows:

"Q. Who hires the guard?

"A. The personnel manager and the Chief.

"Q. Who has the authority to discharge you?

"A. The personnel manager or the Chief, I would think, of E. C. Atkins and Co."

These answers by the witness merely represented his opinion and, in addition, the "Chief" referred to was Chief Johnston who,

as will be shown, was entirely under the control of the military. Putting aside, however, such considerations, a reading of Gann's entire testimony shows conclusively that he was employed in the same manner as all other guards. This is illustrated by the following questions and answers:

"Q. From the 21st of January to the 27th of January you were an employee of E. C. Atkins and Company?

"A. Yes, sir.

"Q. They pay you whether you are their employee or whether you are a military policeman, but from January 27 you became a military policeman and were no longer an employee of E. C. Atkins and Company, as you had been up to January 27? Your status changed, did it not?

"A. That's right. I wasn't a member of the Auxiliary Military Police until I was inducted January 27."

The most favorable possible inference which can be drawn from the record is that respondent's authority, if it had any, with reference to hire and discharge was narrowly limited; in fact, as we have stated, we think it had no right in such matters except that of making recommendations to the military authorities.

This brings us to the matter of control. The Board's finding in this respect may be properly characterized as wholly impotent. It admitted that "respondent may have surrendered to the military authorities many of the attributes of control which it would normally possess over its plant guards." It found, however, that it retained "a sufficient residual measure of control." What was intended by this language is not explained. The findings are silent as to any act or conduct on the part of respondent which evidences any control. The oral testimony shows without any contradiction that all members of the plant guard at the Main Plant took their orders and instructions from Chief Johnston. (We assume that the members of the force at the Ordnance Plant likewise took their instructions from Chief Hann; at any rate no question is raised but that the same situation existed at each plant.) The record shows with the same degree of certainty that Johnston took his instructions in toto from the military authorities. The only reference made by the Board in this respect was that Johnston "works very closely and cooperates with respondent's representatives." We should think that the exercise of ordinary common sense would require cooperation between the military and the management, but that fact certainly can form no basis for an inference that respondent exercised control. Especially is this so when the direct uncontradicted evidence is that all control was exercised by the Army. In this connection

it seems appropriate to relate certain portions of Johnston's testimony, and we do so in a footnote.[2]

The witness Gann, who testified that he was acquainted with all the duties of a guard, did not mention a single instance in which any duty was performed under the direction of respondent. On the other hand, he conceded that all duties were performed under orders received from the military. True, at one place in his testimony he was asked, "What, in general, do guards do?" and answered, "In general they guard the plant, supposed to obey all the general orders and specific orders which the company asks us to obey." Later he testified, in complete harmony with the other witnesses, that by general orders he meant those issued by the government pertaining to the service generally, and by special orders he meant those issued by the government which applied especially to respondent's plant. Then he was asked, "And when you said 'company orders' you did not mean the E. C. Atkins Company, but the military company to which you belong? They are the lieutenants, the assistant chief, the chief, and then Lt. Scanlon and Capt. Wetenhall?" And he answered, "Well, that's true."

That the military had control even to the minutest detail is shown by the testimony of Gann that special orders were received from the military as to the particular gate through which certain trucks should enter the plant. Also illustrative of this absolute control is the testimony of Johnston. In response to a question as to what he would do if he found Mr. Wood tampering with machinery or personnel, he answered:

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[2] "Q. Do you take any orders from Mr. Wood who sits here in the court room and is the personnel director of E. C. Atkins and Company?
"A. Yes, naturally, I work very closely with Mr. Wood, as he is personnel director of the plant and there can be much more efficient guarding of the plant and operation of the plant if we do work closely. I have never taken an order as such from him.
"Q. You try to cooperate?
"A. I try to cooperate to the best of my ability and he does the same for me."
* * * * * * *
"Q. Now, how do you receive the general orders for your duties, from what source?
"A. General orders are received from Captain Wetenhall of the Fifth Service Command, Cincinnati."
* * * * * * *
"Q. (Referring to violation of military orders.) To whom do you report such violations? * * *
"A. I would report any violation, any serious violation, to Captain Wetenhall of Cincinnati.
"Q. And who instructs you to enforce orders?
"A. It would be the government."
* * * * * * *
"Q. Do any of the Military Police under your command take any orders from any officer, director, or agent of the Atkins company as such?
"A. No, they wouldn't take any orders. Just like myself, they would cooperate in any way they could, but they would only——
"Q. Suppose such cooperation involved deviation from such specific order which you had to give. Would they follow your specific order or would they cooperate?
"A. They would—that would be their orders—to follow mine, yes, sir.
"Q. You would have the same reaction towards such request of cooperation as you would if you had a specific order or a general order to the contrary from one of these superiors, is that right?
"A. Yes, sir. In those orders, it says, 'No conflicting interest.' It means a little different thing there but it means a lot besides. You would follow your Governmental orders first. They would have a much higher priority."

"Well, in a case like that, I would just turn him in, like anybody else. I would arrest him and turn him in because I am sworn to do that. I have sworn an oath.

"Q. Would you do the same with the president of the company?

"A. Yes, sir, I would.

"Q. And you own no responsibility to the president or any director of the company which would make you violate your oath to the Military?

"A. No, sir, there is no reason for that."

Johnston also identified three forms of passes which were issued to various employes, one for admission from the outside into the armor plate division, another for admission into the same division by an employe entering from another department, and another known as a gate pass, which permitted the entering and departure from a gate. No employe could enter a gate or a building until he had exhibited to a member of the guard the appropriate pass. Even an executive of the company could not enter a gate or go from one building to another without exhibiting his pass to a guard. These were military orders.

The statement in the Board's findings that respondent's personnel director "referred to the guards at the plants involved as respondent's employees" is also without substance. It is based solely upon the following questions and answers:

"Q. How many of your employees at the main plant are plant guards or Auxiliary Military Police?

"A. Thirty-two.

"Q. When you say your employees, they are your employees only in the sense that you pay their wages, is that right?

"A. That is correct.

"Q. And you make the necessary pay roll deductions?

"A. That's right."

We think the conclusion is inescapable that the Board's findings based upon proof as to what actually happened is without substantial support. The proof shows without contradiction that respondent (1) paid the guards, but under the circumstances heretofore related, (2) had nothing to do with hiring and discharging other than making recommendations as to the former, and (3) exercised no control. True, the Board intimates that respondent failed to exercise the authority which it had, and stresses certain provisions in the documentary evidence which perhaps lend some color to the suggestion. We are of the view, however, that the employer-employe relationship must be determined from the actual situation as disclosed by the proof rather than from what the situation might have been. In this connection, we observe that the Board has called to our attention a number of its own decisions wherein it has decided that plant guards are employes. Some of

these cases we have studied, and we think the facts, especially as disclosed by the oral testimony on the matter of control exercised by the company, are quite different from those shown here. We are further of the view that this case must be decided on the facts contained in the record before us and not on the Board's decisions in other cases on different facts.

While we have heretofore made numerous references to the documentary proof, we think that it is entitled to further consideration. It is plain from the record that both respondent and the guard members formulated their activities largely upon the instructions contained in guard orders 1, 2 and 3. It is doubtful, at any rate there is nothing in the record to disclose, that they were even aware of some of the documents which the Board now relies upon and especially Circular No. 15, issued by the War Department March 17, 1943. (This Circular, as heretofore noted, was not introduced in evidence.) The guard orders were posted in various places at the two plants and were the orders under which the guards actually worked. The importance attached to these orders is shown from the fact that they were blown up in photostatic replicas, "enlarged four times," that the plant guards could familiarize themselves with their provisions.

Guard order No. 1 had underlined for particular emphasis the following sentence: "No conflicting interest of any kind will be permitted to interfere with the successful accomplishment of this mission." There is not a word in such order which intimates other than that the guard members are entirely under the jurisdiction and authority of the military. They are told that they are subject to the Articles of War and court martial, that a commissioned officer of the United States Army has been placed in command, that the mission of the guard force is to provide protection for the plant, that a member is available for military use whether on or off duty, that protection of the plant and its production is essential to the successful prosecution of the war, that service begins with the date he is inducted into the military police, and that no member may resign without the written approval of the District Plant Guard Officer.

Guard order No. 2 states eighteen general orders which the member is required to be prepared to recite when directed by his superior officers. A comparison of these guard orders with the Basic Field Manual or Solders' Handbook, edition of July 23, 1941, issued by the War Department, shows that the duties, responsibility and discipline of a plant guard member is as strict as that imposed in any branch of the military service.

Guard order No. 3 authorizes the wearing of service stripes in accordance with Army regulations for services faithfully performed, and provides that "service will begin with the date that

the plant guard was inducted into the Auxiliary Military Police."

The Board places strong reliance upon certain provisions contained in Circular No. 15 of the War Department, dated March 17, 1942. This document occupies twenty full pages of the Board's brief. A cursory reading of certain statements contained in this document seem to indicate that respondent had some measure of authority over members of the plant guard. Even if this be so, however, as we have heretofore shown, all authority and control was taken over by the Army and none was exercised by respondent. Furthermore, we are of the view that this document when considered as a whole, and especially when considered in connection with other documents to which we have referred, leaves little room for the contention that respondent had the right but failed to exercise control.

We shall refer to a few of the more striking statements relied upon by the Board. The document states:

"Nothing in this circular will be construed as modifying the responsibility of plant management 'for providing adequate protection at all times against all hazards.'"

Certainly this statement constitutes no proof that respondent actually exercised any control of the plant guards or even that it had any right to exercise such control. Moreover, immediately following the statement just quoted, the plant guard officer is authorized to take appropriate action to correct any defective or inadequate performance "by the guard force of its ordinary protective duties." The document states:

"The mission of this guard force is to provide protection for this plant. In addition to its normal functions the force or any member thereof whether on or off duty is available for military use in any emergency * * *. No conflicting interest of any kind will be permitted to interfere with the successful accomplishment of this mission."

We are unable to discern any assistance in this statement for the Board's theory. It appears certain that the protection for the plant referred to is that which the government requires in behalf of the war effort. The statement recognizes that whether services rendered be normal or of an emergency character, they are rendered as members of the force. Another statement relied upon: "The Auxiliary Military Police will continue to function as formerly * * *. Control, therefore, will be exercised as heretofore through the plant management." This statement is also meaningless, in view of the fact that no plant guard system had theretofore been in existence at respondent's plant. Furthermore, as already shown, actual control of the guard force was taken over by the military.

Another provision emphasized by the Board is:

"Basically, the militarization of plant guard forces does not change the existing systems of hiring, compensation, and dismissal, all remain primarily a matter between the guards and the plant managements."

The interpretation which the Board places upon this statement is immediately dispelled by the sentence which follows:

"A member of the Auxiliary Military Police may not be employed or dismissed and may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant's guard force would be impaired and declines to give his approval thereto."

How it can be said that respondent had the right to hire and dismiss when that prerogative was placed squarely in the Army is a theory we are unable to follow. In this connection, it is pertinent to note that this document also provides:

"The Auxiliary Military Police, as agents of the Federal Government, will not be subject to any state or municipal requirement which conflicts with their war-time duties."

We now refer to certain provisions of Circular No. 15 which really constitute the backbone of the Board's argument that members of the plant guard are employes of respondent and entitled to collective bargaining. It is provided:

"The status of the employer in respect to the employee benefits for the guard force is not changed. For example, social security, workmen's compensation, and employers' liability provisions remain unaffected."

Also:

"Auxiliary Military Police are permitted to bargain collectively, but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police. * * * If any proposed labor agreement is being considered which involves plant protection employees who are or may become members of the Auxiliary Military Police, the contracting parties will be urged to insert in such agreement a provision substantially as follows: 'It is understood that for the duration of the war this agreement is in all respects subject to the provisions of the directives of the War Department concerning military organization of the plant guard forces * * * and that nothing contained in this agreement will be construed in any way to interfere with the organization, efficiency, training, and control by the War Department of the company guard force as an Auxiliary to the Military Police, nor to abrogate or interfere with the duties, responsibilities, and rights imposed by the War Department upon any employee in such Auxiliary Military Police'."

We suppose that these provisions represent an effort on the part of the War Department to preserve, in the instant situation to create, the status of employer-employe relationship between members of the plant guard and respondent. It attempted to counteract the emasculating effect which its orders and directives had had upon the ordinary incidents attending such relationship. In our judgment, these provisions weaken rather than strengthen the position of the Board. The War Department, acting under the authority of the President's proclamation, created this guard force. In doing so, it stripped the respondent and denuded members of the force of all the attributes common to the employer-employe relationship. Having created this situation, we think it was without authority to revitalize that which it had destroyed.

These provisions may indicate a willingness or even a desire on the part of the War Department that plant guards retain their status as employes, but even so, such desire cannot determine or alter the legal rights of the parties. Furthermore, the right to bargain is limited, if not destroyed, by the condition "but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police." This gratuity on the part of the War Department is on a par with that extended to a boy when he is given permission to swim, providing he stays away from the water. The requirement that "for the duration of the war" any agreement between plant guards and the plant must be subject to the directives of the War Department and will not interfere in any way with the duties and responsibilities imposed by the War Department is, in effect, the postponement of the right to bargain, as contemplated by the Act, until some future time.

The Board found, apparently in response to a contention made by respondent, that the plant guards are not employes of the United States of America. From this it argues that because they are not employes of the government they must be those of respondent. We are not impressed with this argument. Neither do we think it is necessary for us to determine the technical status which they occupy with the federal government. That they sustain a relationship closely akin to that of a soldier cannot be doubted. The Certificate of Enrollment issued by the War Department provides that the applicant "has been voluntarily and duly enrolled as an Auxiliary to the Military Police with the rank of _____ for service with the Army of the United States at E. C. Atkins and Company." Thus they are enrolled "for service with the Army." Moreover, the War Department itself in Circular No. 16 as already noted, designates them as "agents of the federal government." Irrespective, however, of their technical classification, there can be no doubt but that they are representatives of the federal government for the duration of the war and engaged in a service necessary

for its successful prosecution. In our view, the relation which they sustain to the federal government is wholly incompatible with the theory that they are employes of respondent within the meaning and purpose of the National Labor Relations Act. We hold accordingly.

The further question, closely related to the one we have just decided, is whether the Board's order requiring respondent to bargain with the Union should be enforced. In considering this question, we assume, contrary to our holding, that members of the military guard are employes of respondent.

The purposes and policy of the National Labor Relations Act are well known and need not here be dwelt upon. The Board must comply with the requirement "that the unit selected must be one to effectuate the policy of the Act, the policy of efficient collective bargaining." The capacity in which the Board acts is succinctly stated in National Licorice Co. v. N. L. R. B., 309 U. S. 350, 362:

"The Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining and by protecting the 'exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment. * * *'."

See also Amalgamated Utility Workers v. Consolidated Edison Co., 309 U. S. 261, 265.

There is no room for argument but that any field open for bargaining between the Union and respondent is an extremely limited one. This must have been fully recognized by the War Department when it included in Circular No. 15 heretofore discussed the admonition that "no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police." As already pointed out, the Act contemplates "full freedom" on the part of the employes, with the right of "efficient collective bargaining." It is difficult to understand, in view of the policy stated, how the right to bargain, not fully and efficiently but only in some limited fashion, can be contemplated by the Act.

A more cogent reason, however, why enforcement should not be allowed is that to do so would be or is likely to be inimical to the public welfare. The Board in its order entirely ignores the unusual status occupied by members of the plant guard by reason of their enrollment for service with the military. As heretofore shown, they are largely if not entirely under the control and direction of the War Department. They wear the uniform of a soldier, owe the same allegiance, receive their authority and com-

mands from the same source, are enlisted for the duration of the war for service with the Army, and are engaged in the performance of a service essential to the successful prosecution of the war. Pertinent is the statement in Southern Steamship Co. v. N. L. R. B., 316 U. S. 31, 47:

"It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives."

In the recent cases of N. L. R. B. v. Jones and Laughlin Steel Corp. and N. L. R. B. v. Federal Motor Truck Co., decided December 8, 1944 (Circuit Court of Appeals, 6th Circuit), the court in denying enforcement orders under a situation similar to that of the instant case said:

"The national welfare is of supreme importance and especially is this true in time of war. The evidence reflects the deep concern of the Government for the maintenance and protection of respondents' plants and for the integrity and volume of their products. * * * It must be kept in mind that in time of national peril, the preservation, protection and promotion of the national welfare is the paramount objective; and the Board must select bargaining agents with this in view."

We agree with the statement just quoted. Nothing should be permitted which will interfere in any degree or to any extent with the obligation which these guards have with the military. Membership in a union with the right to bargain might, in fact is likely to, do that very thing. To so state is not to cast any reflection upon the patriotism of the guard members. It is merely a recognition of that which is a matter of common knowledge.

In concluding, it is pertinent to observe that the enforcement of this order would be little more than an idle gesture. It is difficult to see how it could be of any practical benefit, and it might do immeasurable harm to the war effort and consequently to the public interest. The petition for enforcement is denied.

KERNER, Circuit Judge, concurs in the result.

A true Copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

And on the same day, to wit: On the twenty-seventh day of February, 1945, the following further proceedings were had and entered of record, to wit:

TUESDAY, February 27, 1945.

Court met pursuant to adjournment.
Before: Hon. WILLIAM M. SPARKS, Circuit Judge; Hon. J. EARL MAJOR, Circuit Judge; Hon. OTTO KERNER, Circuit Judge.

8669

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

E. C. ATKINS AND COMPANY, RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the petition of the National Labor Relations Board for enforcement of its order entered in this cause on May 30, 1944, be, and the same is hereby, denied.

United States Circuit Court of Appeals For the Seventh Circuit

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages contain a true copy of the Opinion filed on the twenty-seventh day of February 1945, and Judgment entered on the same day, in Cause No. 8669, National Labor Relations Board, Petitioner, vs. E. C. Atkins and Company, Respondent, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this tenth day of April A. D. 1945.

[SEAL]

KENNETH J. CARRICK,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1945

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FEDERAL MOTOR TRUCK COMPANY

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

JONES & LAUGHLIN STEEL CORPORATION

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

E. C. ATKINS AND COMPANY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURTS OF APPEALS FOR THE SIXTH AND SEVENTH CIRCUITS

The Solicitor General, on behalf of the National Labor Relations Board, prays that writs of certiorari issue to review decrees of the United States Circuit Court of Appeals for the Sixth

Circuit entered on December 8, 1944 (*Federal*, R. 140; *Jones*, R. 111),[1] setting aside orders of the Board issued against Federal Motor Truck Company and Jones & Laughlin Steel Corporation, and a decree of the United States Circuit Court of Appeals for the Seventh Circuit entered on February 27, 1945 (*Atkins*, R. 267), setting aside an order of the Board issued against E. C. Atkins and Company.

OPINIONS BELOW

The Circuit Court of Appeals for the Sixth Circuit issued a single opinion in the *Federal Motor Truck* and *Jones & Laughlin* cases. The opinion is reported in 146 F. (2d) 718. The findings of fact, conclusions of law, and orders of the Board in these two cases (*Federal*, R. 117–121, 105–113; *Jones*, R. 99–101, 84–92) are reported in 54 N. L. R. B. 984, and 53 N. L. R. B. 1046, respectively. The decisions of the Board in prior representation proceedings which form part of the record in these cases (*Federal*, R. 22–27; *Jones*, R. 71–75) are reported in 50 N. L. R. B. 214, and 49 N. L. R. B. 390, respectively. The opinion of the Circuit Court of Appeals for the Seventh Circuit in the *Atkins* case (*Atkins*, R. 247–266) is reported in 147 F. (2d) 730. The findings of fact, conclusions of law, and order of the

[1] Record references relating to the three respondents herein will appear as follows: Federal Motor Truck Company (*Federal*, R. —); Jones & Laughlin Steel Corporation (*Jones*, R. —); E. C. Atkins and Company (*Atkins*, R. —).

Board (*Atkins*, R. 16–33) are reported in 56 N. L. R. B. 1056. The decision of the Board in a prior representation proceeding which forms part of the record in this case (*Atkins*, R. 33–37) is reported in 52 N. L. R. B. 1470.

JURISDICTION

The decrees of the Circuit Court of Appeals for the Sixth Circuit in the *Federal Motor Truck* and *Jones & Laughlin* cases were entered on December 8, 1944 (*Federal*, R. 140; *Jones*, R. 111). Petitions for rehearing filed by the Board were denied on February 6, 1945 (*Federal*, R. 141; *Jones*, R. 119–155). The decree of the Circuit Court of Appeals for the Seventh Circuit in the *Atkins* case was entered on February 27, 1945 (*Atkins*, R. 267). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. The question presented by the *Atkins* case is whether members of the plant protection force of a private employer who are also members of the Auxiliary Military Police of the Army of the United States are "employees" within the meaning of Section 2 (3) of the National Labor Relations Act.

2. The question presented by the *Federal Motor Truck* and *Jones & Laughlin* cases is whether the

Board, in the exercise of its administrative discretion, may properly require an employer in time of war to bargain collectively with a labor organization as the representative of the employer's plant protection employees when those employees are members of the Auxiliary Military Police of the Army of the United States, and when the labor organization which represents them also represents a separate bargaining unit composed of the employer's maintenance and production employees.

3. A third question which may possibly be presented by each of the three cases is whether the Board abused its administrative discretion in holding that, in time of war, plant protection employees who are members of the Auxiliary Military Police of the Army of the United States may exercise the collective bargaining rights guaranteed by the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are set forth in Appendix A, *infra*, pp. 30–33.

STATEMENT

The formal proceedings in each of the three cases followed an identical pattern. In each case a union filed a petition for investigation and certification of representatives under Section 9 (c) of the Act, alleging that a question had arisen

concerning the representation of plant protection employees (*Federal*, R. 14–15; *Jones*, R. 1–2; *Atkins*, R. 33–34). In each case the Board, after a hearing, issued a decision and direction of election finding that the plant protection employees were "employees" within the meaning of the Act, that they constituted an appropriate bargaining unit, and that they were entitled to the collective bargaining rights guaranteed by the Act, despite the fact that they were members of the Auxiliary Military Police (*Federal*, R. 22–27; *Jones*, R. 71–75; *Atkins*, R. 33–37). The petitioning union in each case was selected by a majority of the eligible employees in the election and was certified by the Board as the representative of the plant protection employees (*Federal*, R. 29–30; *Jones*, 47–48; *Atkins*, R. 26–27).

Thereafter, in proceedings under Section 10 (c) of the Act, the Board issued decisions finding that each of the respondents had refused to bargain collectively with the certified representative of its plant protection employees, thereby engaging in unfair labor practices within the meaning of Section 8 (5) and (1) of the Act (*Federal*, R. 117–118, 105–112; *Jones*, R. 99–100, 84–92; *Atkins*, R. 16–18, 21–31). The Board issued orders requiring each respondent to cease and desist from refusing to bargain with the named representative of its plant protection employees; from engaging in any like or related acts or conduct interfering with, restraining, or coercing the employees; upon

request to bargain collectively with such representative; and to post appropriate notices (*Federal*, R. 119–120; *Jones*, R. 100–101; *Atkins*, R. 19–20).

The evidence in support of the Board's findings in each of these cases that the plant protection employees herein, despite the fact that they were members of the Auxiliary Military Police, were "employees" within the meaning of the Act and entitled to exercise the bargaining rights guaranteed thereby may be summarized as follows:

The employer in each case is a manufacturer engaged in the production of war materials for the United States Government.[2] At the time the refusals to bargain occurred the plant-protection employees at each plant were members of the Auxiliary Military Police (*Federal*, R. 25; 133–134; *Jones*, R. 73; 9, 11; *Atkins*, R. 17, 35–36; 39, 41, 45–46, 51–52, 67), a guard force established by the War Department on July 2, 1942 (Appendix B, *infra*, pp. 34–37), pursuant to authorization by the President's Executive Order No. 8972, dated December 12, 1941 (6 Fed. Reg. 6420), as a security precaution for the protection of strategic premises

[2] The plants of Federal Motor Truck Company, a Michigan corporation, are located in Detroit, Michigan (*Federal*, R. 107, 117–118; 104–105). The Jones & Laughlin Steel Corporation is a Pennsylvania corporation. The only plants of the corporation here involved are the two plants located in Cleveland, Ohio, and known as the Otis Works (*Jones*, R. 85–86, 99; 59–61). The plants of E. C. Atkins and Company, an Indiana corporation, are located in Indianapolis, Indiana (*Atkins*, R. 25, 16–17; 65–67).

and materials important to the prosecution of the war. On March 17, 1943, the War Department issued regulations defining the purpose of the Auxiliary Military Police and the duties, obligations, and employment status of plant-protection employees who became members thereof (*Federal*, R. 75–96).[4] Under these regulations the stated purpose and basic duty of a militarized plant-protection force is "to provide internal and external protection of the plant against sabotage, espionage, and natural hazards [and] to serve with the Army in providing protection to the plant and its environs in emergency situations" (*Federal* R. 76). Within the scope of this broad assignment the specific functions of the militarized guards in the three instant cases, did not vary materially from plant to plant. The guards were required generally to guard the plant gates and identify employees entering or leaving the plant, quell disturbances in and around the plant, enforce plant safety rules, keep a lookout for fire hazards, and in short to police the plant premises with a view to preventing destruction of property and inter-

[4] The basic War Department regulations were introduced in evidence only in the *Federal Motor Truck* case (*Federal*, R. 53–54, 75–96). As the Circuit Court of Appeals for the Seventh Circuit correctly held in the *Atkins* case, however, the War Department regulations are public documents of which the Board and the courts may take judicial notice (*Atkins*, R. 253). Cf. *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 483–484.

ruptions of production (*Federal,* R. 25; 49, 56; *Jones,* R. 8, 11–12; *Atkins,* R. 41–42, 49, 51, 102–103, 124).

At the time the guards were made members of the Auxiliary Military Police they were required, in accordance with the War Department regulations (*Federal,* R. 82), to enter into a written agreement with, and give a pledge of loyalty to, the United States (*Federal,* R. 25; 44, 70–71; *Jones,* R. 73; 9–10; *Atkins,* R. 17; 43, 54–55, 104–105). The regulations also subjected the guards to certain of the Articles of War (*Federal,* R. 80), to military law (*Federal,* R. 91–93), and required them to undergo military training (*Federal,* R. 90–91). The plant guard forces in the instant cases received such military training (*Federal,* R. 25; 45, 48; *Jones,* R. 9; *Atkins,* R. 43–44, 49).

Subject to the proviso that a "member of the Auxiliary Military Police may not be employed or dismissed and may not resign if the plant guard officer or other responsible Army representative believes that the efficiency of the plant's guard force would be impaired and declines to give his approval thereto," the War Department regulations provide that "militarization of plant guard forces does not change the existing systems of hiring, compensation, and dismissal; all remain primarily a matter between the guards and the plant managements [and] guards in the employ of a private employer may, as heretofore, be dis-

missed by that employer * * *" (*Federal*, R. 84). In the instant cases the guards were hired through the companies' regular employment channels and were thereafter, upon approval by the military authorities, sworn into membership in the Auxiliary Military Police (*Federal*, R. 25; 44, 52–53; *Jones*, R. 73; 8–9, 11–13; *Atkins*, R. 17; 41–46, 50, 53, 108). The employer could discharge a guard from its employ subject to the same limited veto available to the military in the case of a company's hiring of a guard (*Federal*, R. 25; 49, 53; *Jones*, R. 73; 12, *Atkins*, R. 17–18; 42, 46–47, 116, 125, 128). Guards employed by a company prior to the militarization of the company's guard force were retained by the company, after militarization, and became members of the Auxiliary Military Police, upon approval by the military (*Federal*, R. 38, 40–41, 44, 46, 51, 133–134; *Jones*, R. 12–13).

The companies carried the guards upon their regular pay rolls, paid their wages, which were fixed by the companies (*Federal*, R. 25; 53; *Jones*, R. 73; 11–12, 18; *Atkins*, R. 17; 42, 49–51, 54),[4] and in accordance with the War Department regulations (*Federal*, R. 87, 89), furnished the guards with uniforms and arms (*Federal*, R. 25; 47, 56; *Jones*, R. 11; *Atkins*, R. 41). In the

[4] In the *Atkins* case the Company made appropriate payroll deductions from the guards' wages (*Atkins*, R. 51, 129), and fixed their rate of pay under the Fair Labor Standards Act (*Atkins*, R. 54).

Atkins case guards were promoted to supervisory positions on the guard force, at increased wages, upon recommendation made to the company by the chief guard, who is a civilian, without informing the military authorities (*Atkins*, R. 126). The regulations provide also that the guards are indistinguishable from other employees of a company insofar as they are affected by "employee benefits" such as "social security, workmen's compensation, and employer's liability" under insurance policies covering the company's employees generally (*Federal*, R. 85; *Jones*, R. 73; 18).

The War Department regulations provide, as to "labor relationships," that "Auxiliary Military Police are permitted to bargain collectively, but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police. * * * The Auxiliary Military Police should be represented in collective bargaining with the management by a bargaining unit other than that composed of the production and maintenance workers, although both bargaining units may be affiliated with the same labor organization" (*Federal*, R. 86–87). To clarify this provision of its regulations the War Department, on July 10, 1943, issued a memorandum interpreting "the same labor organization" to mean "the same trade union local" (Board's Petitions for Rehearing in *Federal Motor Truck* and *Jones & Laughlin* cases (*Jones*, R. 139–140).

The War Department regulations provide that "control" of militarized guards "will be exercised * * * through the plant management except at drill and except in emergency situations," and that "although the plant guard officers will be in command at all times, they will not supplant the civilian guard officers, and unless expediency demands otherwise will exercise their authority through the chain of command established by the plant management" (*Federal*, R. 83). In the *Federal Motor Truck* case the company's plant engineer had charge of the guards (*Federal*, R. 37) and determined their hours of work and work assignments (*Federal*, R. 25; 53). In the *Jones & Laughlin* and *Atkins* cases these matters were under the immediate supervision of a chief guard and his lieutenants, all of whom are civilian (*Jones*, R. 73; 11, 13–14; *Atkins*, R. 17–18; 47, 123, 125).

In the *Federal Motor Truck* and *Jones & Laughlin* cases the same union which represented and sought to bargain for the guards represented the employers' maintenance and production employees in separate and distinct bargaining units. In the *Federal Motor Truck* case the plant-protection employees were represented through a separate local (*Federal*, R. 14–15, 136–137). In the *Jones & Laughlin* case a separate local had not been established for the unit of plant-protection employees at the time of the hearing (*Jones*, R.

1–2, 66–68, 76–77).[5] In the *Atkins* case the plant-protection employees were represented by a different union than the other employees.[6]

Upon the basis of the War Department regulations, the evidence adduced, and in accordance with its established administrative policy with respect to militarized plant guards (*infra*, pp. 16–17, 21–23), the Board found that the militarized guards in each of the cases at bar were "employees" within the meaning of the Act and entitled to the collective-bargaining rights guaranteed thereby (*Federal*, R. 118, 24–26; *Jones*, R. 99, 73; *Atkins*, R. 17–18, 35–36). In the *Federal Motor Truck* and *Jones & Laughlin* cases the Board found, in accordance with its established policy, that there was nothing in the War Department regulations or in the duties or obligations of the militarized guards which made it inappropriate under the Act to permit them to bargain collectively through a union which also represented separate bargaining units of production and maintenance employees of the

[5] Since the close of the Board's hearing, however, as the Board pointed out to the court below in its petition for rehearing (*Jones*, R. 125), the Board has been informed by its Regional Director that the United Steelworkers have chartered a separate local for the protection employees in the *Jones & Laughlin* case.

[6] The guards in the *Atkins* case were represented by Plant Protection Lodge No. 1683, affiliated with International Association of Machinists, District 90 (A. F. of L.), while the Company's production and maintenance employees, with the exception of sawsmiths, were represented by the United Steelworkers of America (C. I. O.). The sawsmiths were represented by Sawsmith's Local Union No. 18,548 (A. F. of L.) (*Atkins*, R. 80, 128–132, 167–170).

same employer (*Federal*, R. 118, 24–26; *Jones*, R. 99, 73–74).

Petitions for enforcement of its orders filed by the Board in the courts below (*Federal*, R. 1–4; *Jones*, R. 104–107; *Atkins*, R. 1–4) were denied. The Circuit Court of Appeals for the Sixth Circuit held, in the *Federal Motor Truck* and *Jones & Laughlin* cases, that the militarized guards were "employees" within the meaning of the Act, but refused to enforce the Board's orders on the ground that it would be against public policy in time of war to require an employer to bargain with a union as the representative of his militarized plant protection employees when the union also represents a separate unit of other employees of the same employer (*Jones*, R. 111–117).[1] In

[1] The *Federal Motor Truck* case presented one question not reached by the court below. The Company contended that the union therein was estopped from representing the unit of guards because the union's contract with the Company on behalf of the separate unit of production employees, whom it represented through a separate local, provided that the union would not accept protection employees for membership. The Board rejected this contention on the ground that such a provision in a collective agreement is invalid in that it contravenes the statutory right of employees to freedom of choice in their selection of a bargaining representative (*Federal*, R. 23–24, 118, 120–121, 108–109). If certiorari is granted the Board desires to defend its determination of this question.

In both the *Federal Motor Truck* and *Jones & Laughlin* cases the court below (*Jones*, R. 113) upheld the Board's determination that the guards were not "supervisory" employees (*Federal*, R. 25–26; *Jones*, R. 99, 94–95). The Board does not intend to present that issue to the Court in these petitions. The question was not raised in the *Atkins* case.

the *Atkins* case the Circuit Court of Appeals for the Seventh Circuit, although expressing its agreement with the Sixth Circuit on the latter point (*Atkins*, R. 266), refused to enforce the Board's order primarily on the ground that the militarized guards were not "employees" within the meaning of the Act (*Atkins*, R. 264–265). A possible interpretation of each of the courts' decisions is that, even if militarized guards be considered employees within the meaning of the Act, it would be against public policy in time of war to permit them to exercise in any respect the collective bargaining rights guaranteed by the Act (*Jones*, R. 116–117; *Atkins*, R. 265–266).

SPECIFICATION OF ERRORS TO BE URGED

In the *Atkins* case the Circuit Court of Appeals for the Seventh Circuit erred:

1. In holding that the militarized guards are not employees within the meaning of the Act.

2. In holding that the Board's finding that the militarized guards are employees of E. C. Atkins and Company, within the meaning of the Act, is not supported by substantial evidence.

3. In holding that "it makes no difference whether they [the militarized guards] were paid by respondent or by the government."

4. In holding that the authority to hire and discharge a militarized guard was solely the prerogative of the military, and that respondent's au-

thority was limited to making recommendations for such action.

5. In holding that the War Department regulations leave "little room for the contention that respondent had the right but failed to exercise control" over the militarized guards and that "all authority and control was taken over by the Army and none was exercised by respondent."

6. In failing to give any weight to the Board's determination and settled policy that the guards, despite their militarization, are employees of respondent within the meaning of the Act and are entitled to exercise the collective bargaining rights guaranteed by the Act, and in substituting its own judgment for that of the Board with respect to the guards' employment status.

7. In setting aside and denying enforcement to the Board's order.

In the *Federal Motor Truck* and *Jones & Laughlin* cases the Circuit Court of Appeals for the Sixth Circuit erred:

1. In holding that it would not effectuate the policies of the Act but would be against the public interest to permit an employer's plant protection employees, who constitute an appropriate bargaining unit, and who are members of the Auxiliary Military Police, to bargain collectively with the employer, under the protection of the Act, through a union which also represents a

separate bargaining unit of other employees of the same employer.

2. In failing to give any weight to the Board's determination and settled administrative policy that the bargaining pattern described in the preceding paragraph effectuates the policies of the Act and in substituting its own judgment for that of the Board with respect to the propriety of such bargaining pattern.

3. In holding that the Board failed to give adequate consideration to the public interest in view of the war.

4. In setting aside and denying enforcement to the Board's orders.

REASONS FOR GRANTING THE WRITS

1. The decision of the Circuit Court of Appeals for the Seventh Circuit in the *Atkins* case holding that militarized guards are not "employees" within the meaning of the Act (*Atkins*, R. 264–265) conflicts with the holding of the Circuit Court of Appeals for the Sixth Circuit in the *Federal Motor Truck* and *Jones & Laughlin* cases that such persons are "employees * * * entitled to the protection of the Act" (*Jones*, R. 113).

The Board's findings in all three cases with respect to the employment status of the militarized guards are in conformity with the regulations of the War Department (*supra*, pp. 7–11). The provisions of these regulations have been integrated

into the Board's settled policy established in a large number of cases in which the Board has examined the employment status and determined the bargaining rights under the Act of plant guards who are members of the Auxiliary Military Police. Since the applicable War Department orders and regulations establish a common status for such guards wherever they are found (*supra*, pp. 6–11), the Board has recognized the "militarized plant guard" as an employee-category which does not vary materially from case to case.* The Board's decisions in earlier cases in this field, as well as its decisions and the supporting evidence in the three instant cases (*supra*, pp. 7–8, 9–10), demonstrate, moreover, that the actual relationship which exists between the employer and his militarized guards is essentially the same in every case.

In holding unsupported by substantial evidence the Board's findings that guards were respondent's employees, the court in the *Atkins* case not only overturned a Board decision which was amply supported but the War Department's own

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*A collection of more than 135 of the Board's decisions upholding the collective bargaining rights of plant guards as "employees" within the meaning of the Act, despite their militarization, appears in Appendix C (*infra*, pp. 38–41). See particularly *Matter of Chrysler Corporation*, 44 N. L. R. B. 881; *Matter of Budd Wheel Co.*, 52 N. L. R. B. 666; and *Matter of Dravo Corporation*, 52 N. L. R. B. 322. See also National Labor Relations Board, *Seventh Annual Report* (1943), p. 63; *Eighth Annual Report* (1944), p. 57.

opinion.[9] The War Department regulations make it clear that, while militarization of plant guards superimposes upon their normal peacetime duties and responsibilities certain additional obligations, their basic status as employees of a private employer is not altered thereby. Plainly when the War Department, which created the Auxiliary Military Police, provided expressly that the guards' compensation was to be determined between the guards and the management, that the guards were to remain subject to the usual social security, workmen's compensation and employer's liability provisions applicable to employees, and that they were to be "permitted to bargain collectively" (see pp. 8–10, *supra*), it manifested its understanding that they continued to be employees for purposes of labor relations and other labor legislation. This statement of the employees' rights by the agency which established their semi-military status in itself demonstrates that the Board's decision that the guards were employees for purposes of the National Labor Relations Act is not unreasonable. In making its own independent appraisal of the facts and coming to a contrary conclusion the decision below in the

[9] Militarized guards have been treated as private employees for purposes of the Fair Labor Standards Act (*Walling* v. *Lum*, 7 Wage Hour Reporter 570 (S. D. Miss.)) and the Social Security Act, and by the National War Labor Board (*In re Detroit Steel Products Co.*, 6 War Labor Rep. 495; *In re Brewster Aeronautical Corp.*, 11 War Labor Rep. 286; *In re Great American Industries*, 11 War Labor Rep. 287; *In re Youngstown Sheet & Tube Co.*, 15 War Labor Rep. 500).

Atkins case would appear to be inconsistent with the rule governing the scope of judicial review in such matters, as prescribed by this Court in *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111.

The evidence shows that the guards' duties, functions, obligations, and relationship with the management were not different in the *Atkins* case from those existing in the "typical" plant guard cases (*supra*, p. 17). The Seventh Circuit apparently was of the view that the fact that the chief guard, a company employee who exercised control over the other guards in the performance of their day to day duties (*supra*, p. 11), regularly received orders from the military authorities rather than from Company management (*Atkins*, R. 47, 117–120, 123) offset the other considerations weighed by the Board. But as this Court held in the *Hearst* case, *supra*, 322 U. S. at 128, "control of 'physical conduct in the performance of the service' * * * the traditional test of the 'employee relationship' at common law," is not the predominant test under the Act.[10] "Employee" is

[10] In any event under the War Department regulations (*supra*, p. 11) the degree of control retained by the employer over the militarized guards who protect his plant satisfies the "control" test insofar as it is applicable here. The *Hearst* case, *supra*; *National Labor Relations Board* v. *Carroll*, 120 F. 2d 457, 458 (C. C. A. 1). See also *New Orleans-Belize S. S. Co.* v. *United States*, 239 U. S. 202; *Standard Oil Co.* v. *Anderson*, 212 U. S. 215; *Carroll* v. *Social Security Board*, 128 F. 2d 876, 879 (C. C. A. 7); and *Restatement of the Law of Agency*, Ch. 7, Sec. 227 (b).

to be construed "with reference to the purpose of the Act and the facts involved in the economic relationship" (*Hearst* case, *supra*, at 129). Inasmuch as the wages, the most important term of employment, are still fixed entirely by private contract between the guards and the respondent, it is clear that from an economic point of view it is appropriate for the guards to engage in collective bargaining. For unless they can bargain collectively as to wages they must bargain individually, which means that in practical effect the employer would unilaterally determine the wages. The needs of the guards in respect to collective bargaining are thus obviously the same as those of employees generally.

2. In the *Federal Motor Truck* and *Jones & Laughlin* cases the Sixth Circuit exceeded the proper limits of its reviewing authority in substituting for the judgment of the Board its own judgment that it would be detrimental to the public interest in wartime to permit plant protection employees who at least otherwise constitute an appropriate bargaining unit, and who are members of the Auxiliary Military Police, to bargain collectively with their employer, under the protection of the Act, through a union which also represents a separate bargaining unit of other employees of the same employer. In the court's view such a bargaining pattern "might" result in a conflict of personal interests on the part of the

guards, which would be inimical to the public welfare (*Jones*, R. 116–117).

The Board in sanctioning the bargaining pattern in these two cases followed its established administrative practice, which accords completely with the expressed policy of the military authorities (*supra*, p. 10), who are charged with ultimate responsibility for the proper functioning of the militarized guards as a wartime protective force. The Board's policy, moreover, follows as a matter of course from the basic purpose and policy of the Act to prevent or reduce industrial strife "by encouraging the practice and procedure of collective bargaining" by workers through "representatives of their own choosing" (Section 1 of the Act, *infra*, p. 31). In applying the broad policies of the Act in cases involving militarized guards, the Board has declared that there is "no *necessary* conflict between self-organization for collective bargaining and the faithful performance of duty" (the *Chrysler* case, *supra*, 44 N. L. R. B. at 885–886). [Italics supplied.] To hold otherwise would, as the Board has observed, amount to an "implication that membership in a union tends to undermine the honesty of plant-protection employees or their competence to execute their duties satisfactorily" (the *Dravo* case, *supra*, 52 N. L. R. B. at 327). Accordingly, the Board has consistently held that it would not serve the purposes of the Act either to deny the statutory bargaining rights to militarized guards, or to restrict their choice of

bargaining representatives, upon the basis of nothing more substantial than the unsupported assertion that such limitations upon the application of the statute are necessary in the public interest. The *Chrysler, Dravo,* and *Budd Wheel* cases, *supra.*

At the same time, the Board has given the fullest consideration to the exigencies of the war emergency and to the effect of the guards' militarization upon their relationship to their employer and to the Government. It has noted that the "militarization of plant-protection employees, while no obstacle to unionization, is nevertheless significant" (the *Dravo* case, *supra,* 52 N. L. R. B. at 328). To accommodate the bargaining process to the situation presented by the militarization of plant guards the Board has, as a matter of policy, segregated such guards into bargaining units separate and distinct from bargaining units of other employees of the same employer,[11] "to the end that the guards may be better able to function within the military sphere, and to permit the military authorities to exercise greater control over the guards" (the *Dravo* case, 52 N. L. R. B. at 328). The Board believes that its unit policy with respect to militarized guards satisfies the security requirements of wartime, and that neither the

[11] See in particular the *Chrysler* case, 44 N. L. R. B. at 886–887; the *Dravo* case, 52 N. L. R. B. at 328; the *Budd Wheel* case, 52 N. L. R. B. at 670–672.

policies of the Act nor the public interest generally require any further restriction upon militarized guards in the exercise of the bargaining rights protected by the Act.[12] And, as we have shown, the military authorities in charge of such guards, who are in a better position than the courts to pass judgment on the national interest in such matters, have approved the Board's view.[13]

The Sixth Circuit, in refusing to enforce the Board's order in the *Federal Motor Truck* and *Jones & Laughlin* cases, relied on mere conjecture

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[12] The "remedy for inefficiency or wilful disregard or neglect of duty on the part of the plant-protection employees lies implicitly in the power of the Company to discipline or discharge them and in the power of the military authority to take all necessary steps to protect the public interest." The *Chrysler* case, 44 N. L. R. B., at 886. Cf. *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 131–132.

Furthermore union contracts on behalf of militarized guards invariably contain a provision subjecting the contract to the War Department regulations affecting militarized guards and provide that the contract shall in no way interfere with the guards' performance of their duties as Auxiliary Military Police. Such a contract is in evidence in the *Atkins* case (*Atkins*, R. 69, 75–76). Excerpts from such contracts appear at *Jones*, R. 141–149.

[13] Experience, moreover, has demonstrated the reasonableness of the Board's policy. The Board has certified bargaining representatives for units of militarized guards in more than 105 cases. In more than 80 of these cases the certified union also represented a separate bargaining unit of other employees of the same employer. Despite this extensive application of the policy followed in the instant cases, however, the Board has received no indication from any source that the dangers to the public interest and particularly to the war effort allegedly inherent in that policy have in fact materialized in any case.

that the bargaining pattern approved by the Board would be detrimental to the public interest because it "might" result in a conflict of personal interests on the part of the guards with respect to their obligations to the Government, the employer, and the union (*Jones*, R. 116–117). We submit that such speculation on the part of the courts does not provide a proper basis for setting aside the determinations of the Board. Cf. the *Hearst* case, *supra*, 322 U. S. at 130–131, and cases there cited. Clearly, the war emergency alone affords no ground for the court's action. As the Board declared in the *Budd Wheel* case, *supra*, 52 N. L. R. B. at 670, "An efficient prosecution of the war effort demands the preservation of the right to collective bargaining, not its destruction." [14]

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[14] Cf. *National Labor Relations Board* v. *Condenser Corp.*, 128 F. 2d 67, 81 (C. C. A. 3), in which the court stated:

"The second consideration, namely, the serious nature of the production of everything that pertains to war industry is of obvious importance. But the argument of lawyers in a courtroom that the disestablishment of a present bargaining unit and the abrogation of a present contract will disturb that production or will not disturb it is necessarily pure speculation. The Board is charged with the responsibility of representing the public interest, not that of private litigants. This the courts have said over and over again. Neither we nor counsel may assume that the Board is not conscious of all the factors to be taken into consideration in the present emergency nor have we any reason to assume lack of competence on their part to arrange such adjustment as is necessary to preserve the public interest. The problem is peculiarly one for expert administration and that the statute has lodged in the Board, not the courts."

3. The questions raised by these cases are important because, if the decisions below stand, they overturn a Board policy which for a period of nearly three years has effected stable conditions in a large and difficult area of labor relations. These decisions reach further than the bargaining relationship between the employers and guards involved in the instant cases. At the present time militarized guard forces, consisting in the aggregate of between fifty and sixty thousand guards, are maintained at approximately three thousand plants throughout the country.[16] In over 135 decisions, the Board has upheld the rights of these guards to bargain collectively under the Act (see Appendix C, *infra*, pp. 38–41). To the extent that the decisions below indicate that employers are not required to deal with plant guards in the manner prescribed by the National Labor Relations Act, they will jeopardize the bargaining relationships which have resulted from the Board's present position. Confusion and uncertainty would also result if the decisions in the Sixth Circuit are regarded as permitting guards to organize only in unions not affiliated with organizations representing other employees of the same employer, inasmuch as that has not been heretofore required.

At the present time the Board has before it in various stages of litigation or investigation 30

[16] This represents a reduction from a peak of some 15,000 plants involving approximately 190,000 militarized guards.

cases the proper disposition of which depends upon the answers to the questions propounded in the instant cases.[16] We are informed also that the National War Labor Board likewise has before it a substantial number of such cases.[17] As we have shown (*supra*, p. 18) militarized guards such as these involved in the instant cases, are considered to be employees of private employers within the meaning of the Fair Labor Standards Act, and the Social Security Act, and by the National War Labor Board. The holding of the Seventh Circuit in the *Atkins* case would appear to cast doubt upon the validity of that view.

It is important to the proper administration of the Act that the Board know whether its established

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[16] These cases include 2 unfair labor practice cases in which the Board wishes to institute enforcement proceedings in the Sixth Circuit; 2 unfair labor practice cases in which hearings have been held and decisions by the Board are pending; 4 unfair labor practice cases in which hearings are pending; and 6 representation cases in which hearings have been held and decisions by the Board are pending. In addition there are on the dockets of 11 of the Board's regional offices 16 representation cases in which petitions for investigation and certification of representatives have been filed by labor organizations seeking to represent militarized plant protection employees.

[17] We have noted above (*supra*, p. 18, note 9) a number of decisions of the National War Labor Board passing upon the employee status of militarized plant guards. We are informed by the Washington offices of the National War Labor Board that, while no comprehensive statistics with respect to pending cases are available, a substantial number of such cases are pending before both the National Board and various Regional Boards.

policy in this field of labor relations is lawful. It is also important for all concerned to know whether, in the exercise of the Board's judgment and administrative discretion as to ways and means of effectuating the policies of the Act in wartime, its determinations are to be accepted by the courts when not unreasonable, or whether, as the courts below appear to hold, its decisions in this difficult field are to be subjected to *de novo* judicial review.

4. The Board has learned from the War Department that the plant protection employees at all of the plants involved in the three instant cases have been demilitarized since the refusals to bargain herein occurred, and are no longer members of the Auxiliary Military Police.[18] The Board believes that this change of conditions neither renders the cases moot nor reduces the necessity of a ruling by this Court upon the questions presented. Since the Board's order in each of the cases is a continuing direction to bargain collectively with the representative designated by the plant protection employees, not because of their militarization but despite it, their demilitarization does not make the orders moot. The demilitarization of the guards, in fact, merely deprives

[18] The guard forces at the plants here involved were demilitarized on the following dates: Federal Motor Truck, October 23, 1944; Jones & Laughlin, May 29, 1944; E. C. Atkins, at one plant on January 6, 1944, and at the other on March 7, 1944.

the employers of the future use of militarization as a defense for refusing to bargain. Moreover, the Board has been informed that each of the three companies is presently refusing to bargain with the guards, irrespective of their demilitarization. The Board's orders thus remain continuing orders which the Board is entitled to have enforced. *J. I. Case Co.* v. *National Labor Relations Board,* 321 U. S. 332, 334; *Federal Trade Commission* v. *Goodyear Co.,* 304 U. S. 257, 260; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, 271. Nor does the demilitarization of the guards herein render moot the question of the effect of the militarization of the guards upon the employers' duty to bargain or upon the propriety of the Board's orders. For the Board's orders cannot stand unless the respondents had previously committed unfair labor practices. If, for any of the reasons given by the courts below, the employers were not bound by the Act to bargain with the representatives of their guards there have been no unfair labor practices and the Board's orders are invalid.

Despite the demilitarization of the guards at the three respondent companies, the questions presented by these cases still remain important to the administration of the Act. The Board is informed by the War Department that the major part of the reduction of the militarized guard forces which can be made prior to the termination of the war has been effected and that any

further demilitarization will be on a very gradual scale. As has been shown, approximately 3,000 plants still retain militarized guards. The decisions below will continue to have the effect of governing the labor relations of guards in these plants, despite the contrary policy of the Board and the War Department. To await a decision in a new case with respect to guards still militarized would indefinitely postpone the termination of a problem of present importance.

CONCLUSION

The questions raised by the decisions below are of substantial public importance. The decision of the Seventh Circuit on the question of "employee" status conflicts with that of the Sixth Circuit. It is respectfully submitted that this petition for writs of certiorari be granted.

HUGH B. COX,
Acting Solicitor General.

ALVIN J. ROCKWELL,
General Counsel,
National Labor Relations Board.

MAY 1945.

APPENDIX A

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes

arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in con-

nection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9 * * *

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

APPENDIX B

Inclosure to ASF Circular No. 15, March 17, 1943

WAR DEPARTMENT,
THE ADJUTANT GENERAL'S OFFICE,
Washington, July 2, 1942.

AG 231.43 (7-2-42) MS-SPAAM-M.

Subject: Military Organization of Plant Guard Forces.

To: The Commanding General, Matériel Command, Army Air Forces;
The Provost Marshal General;
The Chiefs of Supply Services.

1. Guard forces at all War Department plants, posts and stations controlled or operated by the Supply Services or by the Army Air Forces, and at all plants assigned for protective survey and inspection to the Chiefs of Supply Services and to the Commanding General, Matériel Command, Army Air Forces, are to be organized, drilled and instructed as military units subject to the Articles of War. (Art. 2 (d).)

2. These guard forces will be organized as a civilian auxiliary to the Military Police in all ammunition plants and plants where the possibility of sabotage is greatest, giving first priority to those plants which are most vulnerable from the standpoint of sabotage activities. The organization of these civilian guard forces will be extended as rapidly as conditions permit to civilian plants having important government contracts. Priorities will be established in collaboration with The Provost Marshal General.

3. At the time any guard force is organized as a civilian auxiliary to the Military Police, the commanding officer having jurisdiction over the guard force will:

a. Cause the Articles of War prescribed by Article 110 thereof to be read and explained to each member of the guard force;

b. Issue orders and regulations setting forth the duties and responsibilities of the guard force;

c. Organize each guard force with a member of the Army of the United States in command and cause each force to be drilled and instructed with a view to supplementing the Army in resisting attack on war material, war premises, and war utilities which the force is assigned to guard.

d. Require each member of the guard force to give a pledge of loyalty to the United States, and to execute an agreement acknowledging that such Articles of War are understood by him and that he is subject to military law as long as he remains a member of the guard force. (A draft of a form of such agreement is attached.)

By order of the Secretary of War:

(S) J. A. ULIO,
J. A. Ulio,
Major General,
The Adjutant General.

1 Inclosure.
Draft of Agreement.
Copies furnished:
The Under Secretary of War:
The Commanding Generals, Army Air Forces; Services of Supply;

The Inspector General;
The Judge Advocate General;
The Chief of Administrative Services;
Staff Divisions of the Services of Supply;
Divisions of the War Department General staff.

Agreement between the United States of America and _____
(Plant Guard)

In order that the existing military forces of the United States may be most effectively employed in combat activity against the enemies of the United States, the United States is approving the employment of certain guards as a civilian auxiliary to the military police for the purpose of guarding and protecting war material, war premises, and war utilities from injury or destruction by the enemy or otherwise, including the making of arrests, as peace officers, for violations of federal laws, as well as for violations of of orders and regulations issued by military authority. The United States requires that only persons physically fit, well trained in the use of arms, and in the duties incident to their position, and of unquestionable loyalty to the United States be so employed.

Now, therefore, I, _____, who have been or am about to be employed by _____ as a guard at _____ for the purpose guarding certain war material, war premises, and war utilities, in consideration of my employment or the continuation of my employment, do agree with the United States of America that:

(1) I will support and defend the Constitution of the United States against all enemies, foreign and domestic;

(2) I will bear true faith and allegiance to the Constitution of the United States;

(3) I will well and faithfully discharge my duty as a civilian auxiliary to the military police to protect war material, war premises, and war utilities against all enemies, foreign and domestic, and will obey any orders issued in connection therewith by the President, as Commander-in-Chief of the Army and Navy of the United States, and by his duly authorized officers.

(4) I acknowledge that the appropriate Articles of War have been read and explained to me, and that in the performance of my duty to protect such war material, war premises, and war utilities, I am subject to military law during the period of my employment.

(Signature of Plant Guard)

Inclosure to letter, July 2, 1942, AG 231.43 (7-2-42) MS-SPAAM-M.

APPENDIX C

BOARD DECISIONS IN WHICH MILITARIZED PLANT PROTECTION EMPLOYEES HAVE BEEN ACCORDED COLLECTIVE BARGAINING RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT

Matter of Chrysler Corporation	44 N. L. R. B. 881
Matter of The Maytag Company	44 N. L. R. B. 1265
Matter of McCormick Works	44 N. L. R. B. 1332
Matter of Campbell Soup Company	45 N. L. R. B. 6
Matter of Johns-Manville Products Company	45 N. L. R. B. 33
Matter of The Sherwin-Williams Defense Corporation.	45 N. L. R. B. 46
Matter of Bethlehem Steel Company	45 N. L. R. B. 92
Matter of Royal Typewriter Company, Inc	45 N. L. R. B. 291
Matter of The United States Cartridge Company.	45 N. L. R. B. 350
Matter of Otis Elevator Company	45 N. L. R. B. 491
Matter of Curtiss-Wright Corporation	45 N. L. R. B. 592
Matter of Westinghouse Electric & Mfg Co	45 N. L. R. B. 776
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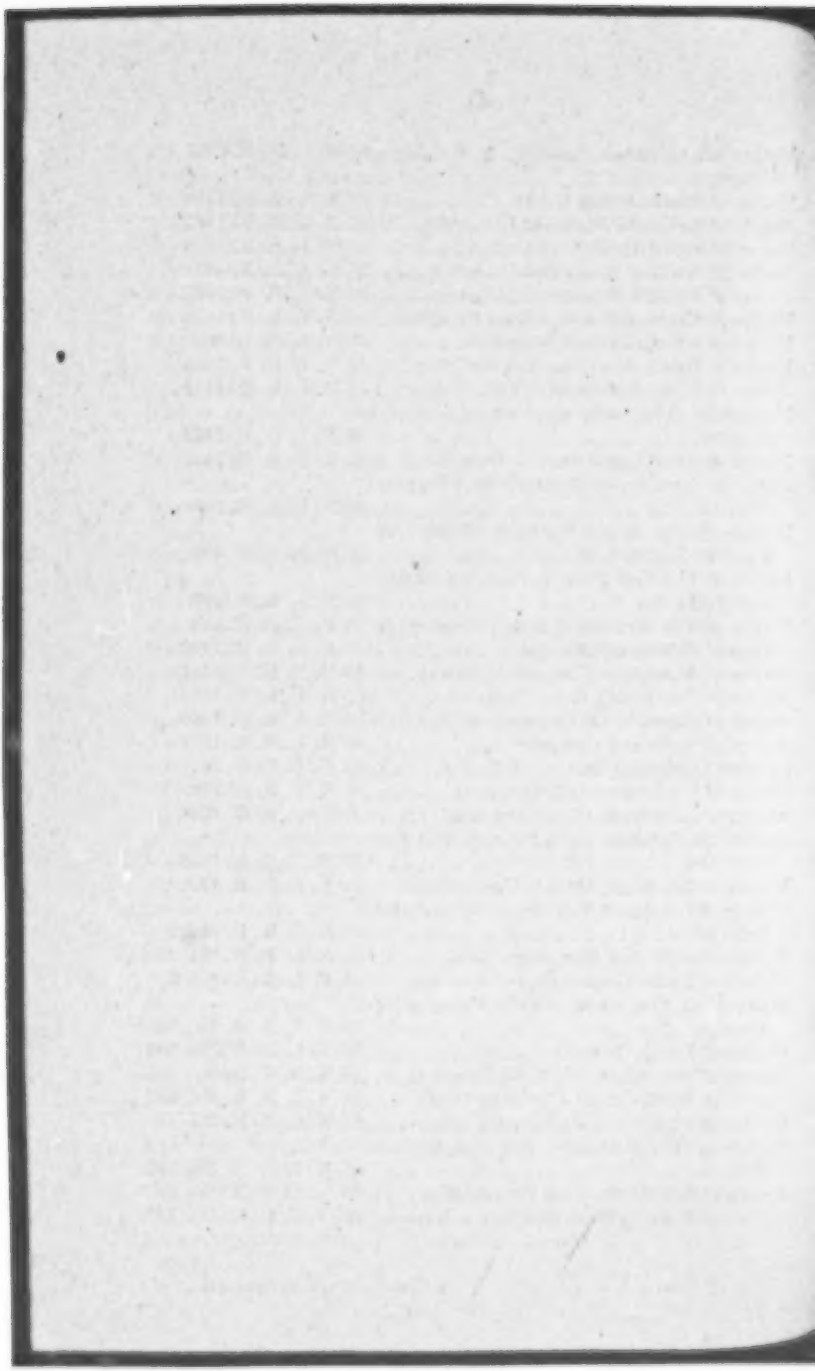

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United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1236

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
FEDERAL MOTOR TRUCK COMPANY

BRIEF OF FEDERAL MOTOR TRUCK COMPANY OPPOSING ISSUANCE OF WRIT OF CERTIORARI

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I.

QUESTION PRESENTED

We do not agree with counsel for the Board in their statement (p. 3 of the petition) that

> "2. The question presented by the Federal Motor Truck * * * cases is whether the Board, in the exercise of its administrative discretion, may properly require an employer in time of war to bargain collectively with a labor organization as

> the representative of the employer's plant protection employees when those employees are members of the Auxiliary Military Police of the Army of the United States, and when the labor organization which represents them also represents a separate bargaining unit composed of the employer's maintenance and production employees."

As the Sixth Circuit properly said in the concluding paragraph of its opinion (p. 723):

> "Confining ourselves to the facts of these particular cases, we conclude for the reasons indicated, that the applications to enforce the orders under review should be, and they are, therefore denied."

The Sixth Circuit only decided this matter as it applied to the peculiar facts of the Federal case.

There is nowhere in the Record here any proof that the records in any of the other militarized plant guard cases to which counsel refer, except the companion case in the Sixth Circuit of Jones and Laughlin Steel Corporation, contain all the facts, the same facts and only the facts found in the Federal record.

The real question in the instant case is whether the Sixth Circuit properly refused to enforce the Board's order, the Board having failed to find that it would be in the public interest to carve out the proposed unit and the Board having failed to find that it would be in the public interest to compel Federal to bargain with the proposed representative of the unit under the facts of the case, the Court concluding that the public interest is to the contrary.

II.

REASONS FOR DENIAL OF PETITION

We respectfully submit that certiorari should be denied.

1.

The decision of the Sixth Circuit is not in conflict with at of any other Circuit Court of Appeals.

It did not hold that the guard force were not employees thin the meaning of the National Labor Relations Act.

All the Sixth Circuit held in the Federal case (146 Fed. 718) was that "the Board failed to give adequate con-leration to the national welfare and this is a funda-ental error" (p. 721) in requiring the Company to col-ctively bargain on behalf of its militarized plant pro-ction force with the United Automobile, Aircraft and gricultural Implement Workers of America, the same bor organization as has a bargaining contract for the mpany's production and maintenance employees.

No other Circuit Court of Appeals has held to the con-ary. Rather, the Circuit Court of Appeals for the venth Circuit in another militarized plant protection rce case, *N.L.R.B. v. E. C. Atkins & Co.*, 147 Fed. 2d 0, said (p. 742):

> "A more cogent reason, however, why enforcement should not be allowed is that to do so would be or is likely to be inimical to the public welfare."

he Seventh Circuit in its opinion, continues by referring the conclusion of the Sixth Circuit in the instant case d stating that it agrees with it (p. 742).

Moreover, the Circuit Court of Appeals for the Fifth Circuit, in *Jones and Laughlin Steel Corporation v. N.L.R.B.*, 146 F. 2nd 833, placed its stamp of approval on the reasoning of the instant case when it said (p. 834):

> "• • • Doubtless other established public policies and interests ought also to be considered, as was recently held in the Sixth Circuit in *National Labor Relations Board v. Jones and Laughlin Steel Corporation*, 146 Fed. 2d 718."

(The *Jones and Laughlin* Sixth Circuit case was a companion case of the instant case, a joint opinion having been rendered.)

2.

There is no important question of federal law involved to be settled by this Court in this case.

a. Counsel would have you believe that the unresolved issue here is whether a court has the right to demand that the Board consider the national welfare. This Court has answered that question a number of times in the affirmative. Thus in *Southern Steamship Co. v. N.L.R.B.*, 316 U. S. 31, 47, it said:

> "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives."

Similarly, in *Phelps Dodge Corp. v. N.L.R.B.*, 313 U. S. 177, this Court refused to put its stamp of approval on the conclusion of the Board that it was in furtherance of the Act and of public policy to order back pay when the employee had made no attempt to secure employment.

In *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240, this Court reversed the Board's conclusion that those who disobey the law by indulging in sit down strikes continue as employees within the meaning of the Act.

In *N.L.R.B. v. Indiana Michigan Electric Co.*, 318 U. S. 9, another case from the Sixth Circuit, this Court held that the Board had abused its discretion in refusing to allow testimony to be taken as to certain dynamiting of the employer's property and that it was in the interest of public policy for the "courts and administrative bodies (to) so employ their discretion as to dispel any belief that use of dynamite will advance legal remedies."

b. In considering the policy of the Act and applying that policy to the facts as found by the Board, the Sixth Circuit but followed the language of this Court in *N.L.R.B. v. Penn. Greyhound Lines, Inc.*, 303 U. S. 261, 625:

> "* * * Hence, upon the challenge of the affirmative part of an order of the Board, we look to the Act itself, read in the light of its history, to ascertain its policy, and to the facts which the Board has found, to see whether they afford a basis for its judgment that the action ordered is an appropriate means of carrying out that policy."

c. Nor did the Sixth Circuit go contrary to the yardtick laid down by this Court in making its determination that the unit proposed by the Board was not in the public interest. In *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U. S. 146, 165, this Court said:

> "* * * As a standard, the Board must comply, also, with the requirement that the unit selected must be one to effectuate the policy of the Act, *the policy of efficient collective bargaining*" (italics ours).

3.

The decision of the Sixth Circuit does not mean, as counsel argue on pages 25 and 26 of their brief, that the alleged policy of the Board as to militarized plant protection employees is overturned. But first let us point out that in connection with this argument counsel go outside the record in the Federal case and recite how many militarized plant guards there are, etc. However, the answer to the argument is that if the Board believes it can get facts into a case substantiating its alleged policy, then it should do so and make proper findings upon such facts. There are no such facts in the Federal record and no such findings. The Federal decision, as the Court expressly states in the concluding paragraph of its opinion, applies only to the facts in the Federal case.

III.

ANSWERING BOARD'S ARGUMENTS IN PETITION

1.

A considerable part of counsels' argument is premised upon findings made by the Board in other cases decided by it. Those findings necessarily must have been based upon the facts of those cases. Whether those facts are the same as the facts in the Federal case, we do not know. Nor are we bound to make that determination. Facts known to a commission but not put in evidence will not support an order. *Chicago Junction Case,* 264 U. S. 258; *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio,* 301 U. S. 292.

2.

Another considerable portion of counsels' argument is based upon Circular No. 15 issued by the Headquarters of the Army Service Forces. There are numerous conclusive answers.

a. On p. 12 of the petition, counsel erroneously state that "Upon the basis of the War Department regulations * * * the Board found * * *." But that is not true because the only reference made by the Board in the Federal case to any regulation of the Army is that "A bulletin issued by the Army authorities with regard to the regulations of military police recites that 'basically, the militarization of plant guard forces does not change the existing systems of hiring, compensation, and dismissal; all remain primarily a matter between the guards and the plant management.'" This reference is in the Board's "Decision and Direction of Election." The "Decision and Order" of the Board in the unfair labor practice case—the instant matter—makes no mention of it.

b. Furthermore, it is not for the Army to decide whether or not public interest is satisfied by requiring an employer to collectively bargain with a unit of militarized plant protection men. That is a question of law. That is the duty of the Board in the first instance, with the Court having the right to determine whether the Board in making such a determination went beyond the limits of its discretion.

c. There is no proof in this record nor finding of the Board of any clear cut determination by the military authorities.

Section 6 h (2) of the circular does not prove, as the Board claims, that the military authorities view the col-

lective bargaining relationship as one appropriate to the status of plant protection employees and consistent with their security functions. The regulation only states that plant protection employees "are permitted to bargain collectively * * *. In view of recent decisions of the National Labor Relations Board," referring to the *Lord Manufacturing Company* case, 47 N.L.R.B. 1032.

Nor does the circular provide that the requirements of security are fully met when there is a separate unit of a plant protection force. Rather, the N.L.R.B. having held that members of a plant protection force constitute an appropriate unit for collective bargaining, the Army merely stated that the unit should be separate from that of rank and file employees. Therefore, it cannot be concluded, as the Board argues, that the unit is shaped in accordance with the views of the security authorities, if by that statement the Board means that the Army believes that a unit of plant protection employees effectuates the policies of the Act.

It must follow that the Sixth Circuit, although it has the right to do so, has not substituted its judgment for that of the military authorities.

d. An examination of the *Lord Manufacturing Company* decision of the Board, cited by the Army in the circular, shows that no claim was made by anyone in that case that the company should not have been required to bargain collectively as to its plant protection employees. Rather, Union A petitioned to be certified as the bargaining agency for the plant guards while the Company and Union B contended that certification should be denied due to the fact that the latter union and the company had a contract covering production employees as well as plant guards. The Board directed that an election be held to determine whether the plant guards desired to be repre-

sented by Union A in a unit comprised only of plant guards.

The three cases cited by the Board in the *Lord* case are *Chrysler Corp.*, 44 N.L.R.B. 881; *U. S. Electrical Motors, Inc.*, 45 N.L.R.B. 298; and *Julius Petersen et al.*, 46 N.L.R.B. 1049. In no one of these three cases did the Board find that public interest would be effectuated by requiring bargaining with a unit composed of plant protection employees. In the *Chysler* case, the Company urged that plant protection employees were instruments of management and should be precluded from a bargaining unit. In the *U. S. Electrical Motors, Inc.* case, plant protection employees were excluded from a unit of production and maintenance employees on the ground that there was no past precedent of bargaining between the Company and its employees including watchmen and because of the "present conditions of the plant"—the Company being in the production of war goods and the guards having been inducted as civilian members of the Auxiliary Military Police. In the *Julius Petersen* case, plant protection employees in plants producing war work were excluded from units of production employees and included in a bargaining unit restricted to employees of their own class.

3.

On pages 20 and 24 of their brief, counsel improperly attempt to state the view of the Sixth Circuit when counsel say "In the court's view such a bargaining pattern 'might' result in a conflict of personal interests * * *." The opinion of the Sixth Circuit unequivocally states (p. 721):

> "We think that in each order under review the Board failed to give adequate consideration to the national welfare and this is a fundamental error."

The opinion does say that "It is manifest that these personal interests of the bargainors, as well as the demands made upon them either by the employees or employers might necessarily constitute a serious and embarrassing handicap when it came to the consideration of the interest of the public. When these particular Unions were selected as bargaining agents for the plant protection employees, these employees might in an effort to discharge their duty to their employers find themselves in conflict with other members of their Union over the enforcement of some rule or regulation they were hired to enforce; or upon the other hand, in conflict with the Federal Government because of fealty to the Union at the time of a dispute involving the public interest. We think that the imposition of such strains upon personal allegiance and personal interest would undoubtedly be detrimental to the public interest and to the free flow of commerce" (pp. 722, 723). The word "might," when read in connection with what the Court said in using the word, and in connection with the entire opinion, can leave no doubt that the Court has not indulged in conjectures and guesses as counsel charge.

IV.

OTHER QUESTIONS INVOLVED IF CERTIORARI IS GRANTED

A.

If certiorari should be granted, Federal agrees with the Board that the matter referred to in the first paragraph of the footnote on page 13 of the petition should be retained in the case. We urge the question there involved should dispose of the case. The Sixth Circuit did not pass on it.

When the members of Federal's militarized plant protection force joined the International a collective bargaining agreement was in effect between the International Union, U.A.W.-C.I.O., and Local 174 and Federal in which it was agreed that certain classifications of employees should be excluded, including plant protection, and

> "• • • that the Union will not solicit or accept the same for membership."

A subsequent contract between the parties, now in effect, contains the same language.

The International thus is under contract with Federal not to accept the plant protection force into membership. This means, of course, that it has agreed not to represent them for collective bargaining purposes.

The record clearly shows that Local 114, the one involved in the present proceedings, is a Local of the International.

The record further shows that Article 18 of the constitution of the International provides—

> "Section 1. It shall be the established policy of the International Union to recognize the spirit, the intent and terms of all contractual obligations developed and existing between Local Unions and employers, concluded out of conferences between the Local Union and the employers, as binding upon them. Each Local Union shall be required to carry out the provisions of contracts so negotiated."

The Locals are therefore bound to carry out such a contract as this one and so is the International.

It is argued by the Board that it would offend the policy of the law to compel the International, or its subordinate Local, to decline to act as a representative solely

because it has bargained not to do so. It is said that a contract with an employer which "renders abortive the exercise of that right" has no statutory standing and it is urged that when a Union "is willing to represent employees, a majority of whom in an appropriate unit have designated it, the statute requires that it be treated as a bargaining agent * * *." There is no provision in the Act that prevents any person who is selected as a representative by any number of employees from refusing to act as such. The argument of the Board would lead to the absurd conclusion that in case employees selected a Union or an organization or an individual, which did not wish to act, or which, because of some defect of power, could not act, it was still compelled to act. This cannot be true. The right of collective bargaining and the exercise of full freedom of designation would not be abridged by such a refusal. Even granted that the employees must have full freedom of choice, they still must choose a qualified representative, one who can act and one who will act.

If this plant protection force had chosen a representative who then declined to act, such for instance as a carpenter's union, there is nothing in the law or in the policy as there expressed that could compel that individual or agency to accept the appointment. It could reject it and the force would have no remedy to compel it to accept it. The fact that in this case the International, by its agreement made before the selection, has said that it and its Locals would not act, and thus rejected the appointment before it was chosen, makes no difference. It is precisely in the situation as if it had rejected the appointment after its selection.

There is, then, no interference with the policy of the Act. The members of the plant protection force, if in fact

they are entitled to be treated as a bargaining unit, which we deny, can still select their representative and have complete freedom of choice, but obviously they must select a representative who can act and will act.

But the argument apparently is that the choice of the representative for collective bargaining is in the employees who desire to select the bargaining agent, and that no agreement between the employer and any other person can limit that choice and the right thereto. It is said that theirs is the right of collective bargaining—the purpose and policy of the statute is to protect it and no agreement by other persons can affect it.

But here the right of this plant protection force to select their agent for collective bargaining has been abridged and modified, not by the agreement between the employer and some person or organization foreign to them, but by an agreement between the employer and themselves acting through the International of which they are members.

The right of choice of the representative for collective bargaining has been limited and abridged by the plant protection force itself since the members of this force, when they authorized the International to act for them, and when they voted that the Amalgamated Local, the affiliate of the International, should be their bargaining agent, were members of the International and bound as members of the International by the agreements of the International.

It must be remembered that this plant protection force initiated this whole proceeding by the execution of so-called authorization cards which designated, not the Amalgamated Local, but the International, as their bargaining agent. When they became members of the International and authorized it to act for them, there was then in effect the agreement between the International and the respondent. They became members of the International and au-

thorized it to act in March, 1943. On April 6th the Amalgamated Local filed its petition for the investigation. This recites that twelve of the members of the force "had designated or selected petitioner (that is, the Amalgamated Local) to be their representative for collective bargaining." The authorization was in fact to the International. It is clear then that the members of this force were then members of the International and members of the Amalgamated Local. They were, of course, still members when later at the election they voted for the Amalgamated Local, and when that Local, affiliated with the International, was certified as having been so designated.

There can be no doubt that a labor union, when authorized by its members, may make contracts in their behalf. Through its officers it can contract or refuse to contract without consulting all of its members. *16 R. C. L.* 425.

It is true that a labor union cannot bind its individual members by contracts which affect their private rights but the contract here does not affect private rights of the members. It has to do with the precise function, the exercise of which is the inducement for membership in the union. This contract has to do with the collective bargaining and the procurement for the members of proper wages and working conditions. To accomplish that very purpose is the reason that the plant protection employees joined the International. The plant protection men, therefore, should be held bound by the agreement of the International. Even if, when they became members of the International, they had no knowledge of the existence of the contract, they then became so far an integral part of the association that they may be bound and their rights foreclosed by the authorized action of the International. This principle was applied as to corporations in the recent case of *Anderson v. Abbott,* 321 U. S. 349, and should be

applied here as against a member of an unincorporated association who is in many respects virtually a partner therein. In this *Anderson* case, it was used to charge to a stockholder a financial obligation assumed by the corporation. There is no reason why it should not cover any other contractual obligation.

It cannot be said that the members of the plant protection force cannot limit their right to select their own bargaining representatives. Collective bargaining is a right only. It is not a matter of compulsion. The statute does not impose it on an employee. It only implements a right already existing. Since the employee may or may not exercise it, he may waive it, limit it or abridge it. This is what has been done here. These employees became members of the International, which made the agreement which limited that right. They thus adopted the agreement. The agreement excluded these men from the benefits of collective bargaining by the International or its Locals. The plant protection force has therefore given up to this extent its right of choice of a collective bargaining agent.

The flagrant bad faith of the International and the Local and the position of the plant protection force, which is at least equivocal, are important factors in this discussion. The question is as to whether or not the creation of this plant protection force as a unit for collective bargaining will, under the circumstances here presented, effectuate the policies of the Act. Will it conduce "to insure to employees the full benefit of their right of self-organization and of collective bargaining and otherwise to effectuate the policies of this Act" (Section 9 (b) of the statute) to create as a unit appropriate for the purposes of collective bargaining these employees who joined the union which had agreed that it would not take them in? Will it effectuate those policies to permit that unit to select as its

bargaining agent the Local of the union that had agreed not to accept them as members or give them the benefits of collective bargaining and which, while such an agreement was in effect and while it was negotiating a new agreement with the employer including the same clauses, accepted the applications of these employees and their signed authorizations that it should act as their collective bargaining agent?

We answer that it is not by such breaches of faith that collective bargaining is promoted and effectuated.

There is no question but what the position of the International as set forth in its agreement is inconsistent with its actions and its present position. It there agreed not to accept these men as members, and then accepted them as members. It undertook that it would not give them the advantages of collective bargaining through it. It is now pressing its demand that it be permitted through its Local to act as their collective bargaining agent. Were the clauses in its contract with Federal material factors in the agreement? Did their presence there affect Federal and its actions? It has not been argued by the Board that these clauses were immaterial, or that the inconsistent position and the action of the International was not to the prejudice of Federal. Certainly the clauses were material. The agreement not to attempt to unionize all the excluded classes was an important part of the agreement and an important factor in the negotiations and must have affected to a substantial extent the decision of Federal not only as to whether it would execute the contract at all, but as well as to whether it would agree as to other clauses in the contract. The record does not indicate, and perhaps such proof would be impossible, as to whether or not any agreement would have been reached between the International and Federal if Federal had not been assured that no attempt would be made to unionize the excluded classes of

employees. But the agreement that the International would not unionize these excluded employees must have been of particular importance else it would not have been so explicitly stated.

Contracts should be enforced. Agreements solemnly made should be performed in good faith. Neither the International nor its affiliate, the Amalgamated Local, should be permitted to avoid the terms of the agreement.

B.

But there are other questions involved in this case if certiorari should be granted, which questions Federal insists should then be passed upon by this Court.

Federal has claimed throughout this case that the members of its militarized plant protection force are not employees within the Act; that they are supervisory employees and so not employees within the Act; that they are not among the classes of employees to which the Congress intended to extend the benefits of the Act; and that the enforced recognition of this Union as the collective bargaining agency of the members of its militarized plant protection force would not effectuate the policies of the Act.

CONCLUSION

Because of the foregoing Federal respectfully submits that the Board's petition for writ of certiorari should be denied.

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FILED
MAY 26 1945
CHARLES ELMORE CROPLEY
CLERK

preme Court of the United States

OCTOBER TERM, 1944

NO. 1237.

TIONAL LABOR RELATIONS BOARD, Petitioner,

v.

JONES & LAUGHLIN STEEL CORPORATION,
Respondent.

IEF FOR RESPONDENT JONES & LAUGHLIN STEEL CORPORATION, OPPOSING PETITION FOR CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, 1944

NO. 1237.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

JONES & LAUGHLIN STEEL CORPORATION, Respondent.

BRIEF FOR RESPONDENT JONES & LAUGHLIN STEEL CORPORATION, OPPOSING PETITION FOR CERTIORARI.

Opinions of the Circuit Court and the Board.

In *re Jones & Laughlin Steel Corporation, etc.*, 49 N.L.R.B. 390 (May 3, 1943: printed also at R. 71), the petitioner, National Labor Relations Board, held that the force of fifty-six (R. 44) armed guards or policemen in respondent's Otis Works—its steel plants in Cleveland, Ohio—constituted an appropriate unit for the purposes of collective bargaining, and directed an election by secret ballot to determine whether or not they desired to be represented for those purposes by the United Steelworkers of America, a C.I.O. labor union.

In *re Jones & Laughlin Steel Corporation, etc.*, 53 N.L.R.B. 1046 (December 2, 1943), the Board reported

its final Decision and Order in the case (R. 99) and also the Intermediate Report of its Trial Examiner issued October 5, 1943 (R. 84), both of which affirmed the validity of the election order just described; held respondent's refusal to recognize the union as representative of the plant police an unfair labor practice, in violation of Section 8 (5) of the National Labor Relations Act; and ordered respondent to grant the union full recognition.

In *N.L.R.B. v. Jones & Laughlin Steel Corporation*, 146 Fed. (2d) 718 (December 8, 1944), the Sixth Circuit Court of Appeals denied the Board's petition for enforcement of its said final Order and Decision of December 2, 1943, holding that respondent should not, under the Act, be required to recognize the Union as representative of the plant police.

Jurisdiction of This Court.

Under Section 10 (e) of the National Labor Relations Act (29 U.S.C. 160 (e)), this Court has jurisdiction to grant or deny a review of the decision of the Circuit Court of Appeals upon Writ of Certiorari, in the manner provided by Section 240 of the Judicial Code as amended (28 U.S.C. 347). The petition for certiorari in this case was timely—it was filed on May 5, 1945, less than three months after February 6, 1945, when the Board's Petition for Rehearing had been denied by the Circuit Court (R. 155).

Counter-Statement of the Case.

Petitioner's Statement is believed subject to criticism, because it tends to confuse the facts of this case with those of the cases of the *Federal Motor Truck*

Company and *E. C. Atkins and Company;* and because, possibly as a result, it almost wholly misstates the question of law which was presented to the Board and decided by the Court below in this case.

According to the petition for certiorari (pp. 12-13), the question presented to and decided by the Board, and later the Court below, related wholly to the status, under the National Labor Relations Act, of members of the Auxiliary Military Police force, created by the President's Executive Order No. 8972, dated December 12, 1941 (6 Fed. Reg. 6420). This may well have been true in the *Atkins* case—to judge by the opinion of the Seventh Circuit Court of Appeals, without reference to that record, but it was not true in this case. Here, the military status of the plant guards was of only incidental importance.

On December 2, 1942, the union which had been exclusive representative for several years of the 4,700 productive steel workers and other laborers at respondent's Otis Works in Cleveland, and of those similarly employed at several other plants also (R. 6-7), made a new contract as such (R. 7; 21; 17). This agreement drew the line between labor—the class of employees of which the union was to have jurisdiction, and management—the class which it did not claim to represent, by excluding from the scope of the contract "* * * Foremen or Assistant Foremen in charge of any class of labor, *watchmen,* salaried employes and nurses" (R. 21).

Shortly afterwards, at some time early in 1943, the union's Cleveland office undertook to "organize" the force of about sixty plant guards at the Otis Works (R. 19). On February 17, 1943, it demanded recognition by the Steel Company as their exclusive representative (R.

6); and, on March 15, 1943, after this demand had been refused by the Company, it filed with the Board the petition, under Section 9 (c) of the Act, which commenced this case (R. 1-2).

At the Board's hearing on this petition, held at Cleveland on April 8, 1943, the Company disputed the union's competency to be certified as exclusive representative of the plant guards, not because the guards had assumed their military status, but instead because the union already represented the 4,700 productive employees (R. 7-8); and because the work of the plant guards made them, as the union's agreement had classified them, part of management, and involved their assumption of essential duties and obligations which prohibited any division of their loyalty between the Company and the union—particularly in time of war (R. 8-9). Their military status was mentioned, but only as an incident of the company's main contentions (R. 9).

These contentions concerning the legal position of the plant police under the Act were, of course, rejected by the Board in its decision to hold the election (R. 71-73), and in its certification of the union as exclusive representative of all of the plant police after it had won the election (R. 47); but they were not modified or abandoned by the Company then or at any later stage of the case, and they remain to this day the grounds for its refusal to recognize the union.

The Company's contentions were renewed at the Board's second hearing of the case, held at Cleveland on September 28, 1943 (R. 49). The documentary evidence received at that hearing (R. 63) included a letter dated June 23, 1943 (R. 77) and a public statement of the

Company's position dated May 25, 1943 (R. 78-79), which reasserted the view that the plant police were an essential part or arm of management, who could not, under the Act, be placed within the jurisdiction of the union. *These documents made no reference to the military status of the police.* At the second hearing, in other words, the Company disputed the Board's conclusion that the police force—whether militarized or not—was an "appropriate unit" for the purposes of collective bargaining under the Act (R. 87).

When the Company filed its exceptions to the Trial Examiner's report, after the second hearing, it restated the same contentions again, and in considerable detail, treating the plant guards' military status only as an incidental matter (R. 93-95). This was its last opportunity to be heard, on this or any other point, before the Board. The Board's final decision (like the Intermediate Report) rejected the Company's views, without any allusion to the military status of the guard force (R. 99-100).

Although it is not shown by the record, it is true, as the Board says at page 27 of the petition for certiorari, that on May 29, 1944, or shortly thereafter, the plant police were "demilitarized" or discharged from the Auxiliary Military Police force. In considering this fact, however, it is important to observe that the Order by which the military authorities accomplished this provided expressly that:

> "* * * The demilitarization of your guard force does not in any way reduce the activities of your guard force, the duties of your demilitarized guard force remain precisely the same.
>
> * * * * * * *

"You may apply to local or state authorities for deputization of your guard force members, which deputization will give them essentially all of the powers which they enjoy as Auxiliary Military Police."[1].

When the case was argued in the Circuit Court, upon the Board's petition for enforcement of its final order-to-bargain, on October 16, 1944, almost three months after the "demilitarization," neither the Board nor the Company treated the military position of the plant police as a matter of any controlling importance.[2] As a result, the Court ignored the "demilitarization" (of which it had no knowledge) and—what is more significant here—its decision treated the assumed military status of the guards, not as a fact controlling their rights under

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1. This last suggestion was unnecessary. All regular members of the guard force at the Otis Works have, for years, been sworn, enrolled and commissioned as special patrolmen on the police force of the City of Cleveland.
2. In the Circuit Court, the Board's statement of the question presented was this:

"The sole issue presented by this case is whether the Board exceeded the bounds of its discretion in finding that respondent's plant-protection employees constitute an appropriate bargaining unit. * * * Respondent contends that this class of employees is not entitled to bargaining rights under the statute and that the Board's contrary finding is arbitrary and capricious. Respondent urges the following grounds in support of its position: (1) Plant-protection employees are not entitled to the benefits of the statute because they are supervisors and members of management and, hence not 'employees' within the meaning of the Act. (2) The policies of the

the Act, but instead as evidence of the public importance, in time of war, of the safety and protection of such steel plants as the Otis Works (R. 116). If the public need for the security of such plants had been sufficient to call for the establishment of military police to guard them, the Court reasoned, the independence and efficiency of such police must be deemed matters of great public importance; and their single-mindedness is, therefore, not to be jeopardized by their union organization, under orders of the Board and under an Act which was intended to infringe no consideration of public policy.

This proposition differs from that attributed to the Court at page 13 of the Petition for Certiorari, etc., in that the Board's hypothesis would make the decision depend wholly upon the military status of the plant police. That the Board's present view of the Circuit Court's decision is a wrong one will be shown, not only by a

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Act would be thwarted and defeated if bargaining rights were accorded these employees, for the conflict in loyalties attendant upon their obligations to respondent, to the United States Government, and to a labor organization would render genuine collective bargaining impossible."

And the Company's criticism of it, in its reply brief, was this:

"To the respondent, it appears that the question should be stated as follows:

" 'The sole issue presented by this case is whether the Board has exceeded the bounds of its discretion in determining that, to effectuate the purposes of the National Labor Relations Act, the respondent must be required to recognize a single industrial union as the representative of both the production and maintenance employees and of the plant guards and police in its Cleveland plants.' "

careful reading of the Court's opinion, but also by reference to the proceedings which followed that decision, in the Court below. In its Petition for Rehearing, filed January 8, 1945, the Board disclosed that the plant police had been "demilitarized" (R. 127). Had military status been the controlling fact in the case, in the view of the Court below, this petition would not have been denied, as it was denied a month later (R. 155).

ARGUMENT.

I. The Writ of Certiorari Is Not Justified by Any Conflict Between the Circuit Court's Decision of This Case and That of the Seventh Circuit Court of Appeals in N.L.R.B. v. E. C. Atkins and Company, 147 Fed. (2d) 730.

As its first reason for urging that the writ of certiorari be granted in this case, the Board argues that the decision here is in conflict with that reached by the Seventh Circuit Court of Appeals in the later case of *E. C. Atkins and Company*. This contention is based by the Board (Petition, p. 16) upon the fact that in the *Atkins* case the Circuit Court sustained the Atkins Company's contention that its militarized plant police were not its "employees" within the meaning of the Act; whereas, in this case, the Sixth Circuit Court of Appeals agreed with the Board that the Otis Works police were "employees," as the Company had conceded for the purposes of the case; holding, however, that the Board's duty, in the determination of the "appropriate unit" question, had not been discharged by its settlement of their employee status.

Although the two decisions are not, as respects this particular point, entirely consistent with each other, there is no such "conflict" between them as would justify the grant of certiorari at suit of the Board in this case—whatever may be said of the *Atkins* case. Were a review granted in this case, no party here could contend that the plant guards are not employees: the Company could hardly be expected to argue a point which it conceded in the Court below; and the Board could ask no relief because the Sixth Circuit Court of Appeals has agreed with its own interpretation of the term "employee." And if, in spite of that, it should ultimately be established that the decision of the point in this case was wrong, and that in the Seventh Circuit right: if, that is, military plant police are not "employees," it would justify no change in the decree of the Court below in this case, because the error was made harmless by that decree. In short, if the inconsistency is a conflict of decisions, as that phrase is used in such matters in this Court, the legal question in conflict is a moot one, so far as this case is concerned.

II. The Court Should Not Treat As an Important Question of Federal Law the Narrow Question Described in the Board's Petition for Certiorari.

As its second, and apparently its remaining, reason for urging that the writ of certiorari be granted here, the Board contends that the decree of the Court below is an erroneous decision of a question of federal law (Petition, p. 20) which has not been, but should be, decided by this Court.

As will appear in a later section of this brief, respondent believes that the ultimate question of law pre-

sented by this case is an important question, and one which should probably be settled by this Court. But it is not the question specifically described in the Board's petition.

In the Board's petition, it is proposed that this Court shall determine an extremely narrow issue: Whether a single union, which already represents other employees of an employer, may properly be certified by the Board in time of war as exclusive representative, for the purposes of collective bargaining, of plant guards who are members of the Auxiliary Military Police.

It is hard to imagine a more squeamish approach to the really important issue presented here. Apparently willing to avoid a full presentation of the issues which were really considered by the Court below, the Board intends that this Court shall hand down a decision which will cease to be of any importance to anybody when the war ends, or when the remaining forces of Auxiliary Military Police are disbanded, or when, for any other reason, the peculiar conditions of March, 1943, cease to exist. It is proposed, in other words, that the Court shall limit its consideration, not simply to plant police, but to a peculiar class of plant police at a particular time—to Auxiliary Military Police in time of war.

It is submitted that the decision of so narrow a question is not a matter of great public importance; and that the assertions of fact made in the Board's petition to support the contrary view fall short of that purpose. The list of cases contained in the Board's Appendix C shows, as is the fact, that during the past three years several of the nationally known labor unions (which had theretofore excluded industrial police from the scope of

their organizational activities) have engaged in a systematic campaign to bring this class of employees within their jurisdiction, and that the campaign has received some encouragement from the Board. But the list shows several other things as well. It shows that, in general, the Board has certified unions as representatives of industrial police in cases in which the employer—doubtlessly for sufficient reasons of his own—has raised no serious objection to the proposal; that, when serious objections have been raised, the Board has generally made no efforts to force acceptance of its certifications by employers—the three cases presented in the present petition are the only cases in which its view has been subjected to judicial scrutiny; and, finally, that the Board has seen, in the decision of the Court below in this case, no reason to change its view: the last two cases on its list, those of the *Bendix Aviation Company* and the *Rohm & Haas Company,* were decided, respectively, on January 27, 1945 and February 12, 1945, long after the Circuit Court had decided this case.[3]

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3. The Board's course my be justified by the concluding sentence of the Opinion of the Circuit Court in this case (R. 117):

> *"Confining ourselves to the facts of these particular cases,* we conclude for the reasons indicated, that the applications to enforce the orders under review should be, and they are, therefore denied." (Italics supplied)

III. Considered Broadly, the Case Does Present an Important Question of Federal Law.

1. *Every such case requires a definition of the rules of law which must guide the Board in its establishment of "appropriate units," under Section 9 (b) of the Act.*

When it held, in this case, that the plant policemen at the Otis Works constituted an "appropriate unit" for the purposes of collective bargaining, but excluded from the "unit" the police lieutenants, captains and supervisors (R. 74-75), the Board effectively determined to extend the scope of the union's jurisdiction: to grant union representation to those employees whom it included in the "unit"; and to deny it to those who were excluded. In short, it resettled the extent to which labor unions shall control employment in the steel industry.

The power to decide such matters was granted to the Board in rather vague terms in Section 9 of the Act. Sections 9 (a) and 9 (b) read as follows:

> "(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *
>
> "(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the

policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

It will be seen that in this case as in every other arising under Section 9, the Board's decision impliedly interpreted Section 9(b) to mean that, to promote the Congressional policy of the whole Act, the plant police must be placed within the union's jurisdiction.

2. *In every such case, the Board is required to decide a most important question: to draw the line between management and labor, in the manner the statute intended.*

Section 9 grants large powers, in an economic field, to the Board. It will be seen that, under these provisions of the statute, the Board might conceivably include almost anybody in any particular unit. Under Section 2 of the Act the word "employee" is given the broadest possible definition—almost anybody is an employee of any other person whose interests he serves.[4] Under the language of Section 9, the employment status of any particular "employee" is placed in the control of the majority of any "unit" in which the Board sees fit to include him; for the labor union or other representative chosen by the majority and certified by the Board has the sole power to deal with the employer concerning the wages, hours and other conditions of employment of every mem-

4. See *N.L.R.B. v. Hearst Publications, Inc.*, 322 U.S. 111; 88 L. Ed. 1170 (1944).

ber of the "unit": no individual bargain, not approved by that union, can be lawful or valid.[5]

In this situation, it is often a matter of great importance to the individual employee that he be placed in a "unit" which will meet his peculiar needs and desires; for, once a union is chosen by the majority of his "unit," he must rely upon it to obtain for him, or to permit him to obtain for himself, satisfactory employment at satisfactory wages, and, in the end, he must often maintain the good will of the union's leaders if he is to keep his job.

But if the establishment of proper "units" is often important to the individual employee, it is, in cases of the kind presented here, of a far greater importance to the employer, for the success of management depends, in the end, upon it. This may best be seen by considering an extreme, hypothetical case, supposed by the Board in one of its leading cases[6]—the case of a supposed "unit" of *all* the employees of a large enterprise—a unit including not only the thousands of productive workers, but also the much smaller numbers of foremen, supervisors, clerks, police and others who enforce the policies laid down by executive management, and finally such ultimate managers as the corporate executives, including the president and directors. All these people are "employees," under Section 2 of the Act, and the supposed "unit" would be an "employer unit" under Section 9 (b); but it cannot be maintained seriously—and

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5. See *J. I. Case Co. v. N.L.R.B.*, 320 U.S. 332; 88 L. Ed. 489 (1944); *Medo Photo Supply Corp. v. N.L.R.B.*, 321 U.S. 678; 88 L. Ed. 749 (1944).

6. *In re Maryland Drydock Company*, 49 N.L.R.B. 733 (1943) at page 738.

the Board has never believed—that the Act intended to permit the Board to disable management by creating any such "unit," and so placing the agents of management under effective domination of the subordinates whose activities they must manage.

Instead, the Board has recognized, in the past, that its power to establish "units" is limited by the requirement of Section 9 that its decisions of all such matters must be rationally calculated to "effectuate the policies of the Act";[7] that one of those policies was to encourage the prosperity and efficiency of private industry and commerce; and that, as a result, no "unit" tending to defeat the legitimate purposes of management could be declared an "appropriate unit."

Going further to implement this view of the meaning of the Act, the Board has recognized—in the past—that the legitimate purposes of management have required the maintenance of traditional distinctions between management and labor; and has—in the past—refused to give to unions, representing labor, jurisdiction of employees who have traditionally been considered members of management.[8]

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7. See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U. S. 146, 165; 85 L. Ed. 1251, 1265 (1940).

8. See *In re Budd Wheel Co.*, 52 N.L.R.B. 666 (September 17, 1943) at pp. 668-669;

> "* * * In deciding that foremen and other supervisory employees could not constitute appropriate collective bargaining units under the Act, we did not hold that they were not employees within the definition of 'employees' in Section 2 (3) of the Act; nor did we find that it was the intent of Congress not to include them within the guarantee of collec-

3. *It has recently become an urgent matter that the Board be given legal rules to govern it in all such cases.*

From the Board's creation in 1935, until about three years ago, this view had the concurrence of the labor unions. Recently, however, having exhausted almost every field of organization amongst productive laborers, certain of the larger, industrial unions have sought to organize such classes as foremen and supervisors, licensed marine officers, plant police, and others traditionally identified with management.

It is this development of the labor movement which gives rise to the important question presented by this case. In the past, when the question first arose, the Board held that, under the Act, foremen could not be placed within the jurisdiction of the labor union which represented their subordinates—rejecting the suggestion

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tive bargaining. Rather, we found that in the absence of a clear expression of Congressional intent it was left to the administrative discretion of the Board to determine whether a specific group of employees was to be included within this guarantee. We then found that the benefits which supervisory employees would achieve through being certified as collective bargaining units 'would be outweighed not only by the dangers inherent in the commingling of management and employee functions, but also in its possible restrictive effect upon the organizational freedom of rank and file employees,' and that such units would 'impede the processes of collective bargaining, disrupt established managerial and production techniques, and militate against effectuation of the policies of the Act.'"

that their independence would be preserved should they be treated as a "separate bargaining unit" from that of their subordinates, as a paper-thin device which could have no real value: *In re Maryland Drydock Co.*, 49 N.L.R.B. 733 (May 11, 1943).

Later, the Board held that foremen, being management, could not have union representation, even though their union was, or was claimed to be, independent from the union which represented their subordinates:

In re Boeing Aircraft Co., 51 N.L.R.B. 67 (July 5, 1943);

In re General Motors Corp., 51 N.L.R.B. 457 (July 20, 1943).

Finally, during the current year, the Board has yielded its former view, abandoned its earlier rule, and in a widely discussed decision, held that foremen may be organized and represented by labor unions, under Section 9 of the Act: *In re Packard Motor Co.*, 60 N.L.R.B. . . .; 16 L.R.R. 168 (March 26, 1945).

A similar, and similarly confusing, history appears in the Board's decisions relating to the status of industrial police. In its earliest case relating to this class of employees, *In re R.C.A. Manufacturing Co.*, 2 N.L.R.B. 159 (1936), the Board excluded such police:

> "* * * The watchmen in the maintenance division, classified as guards by the Company and possessing a uniformed appearance, are a group obviously separate from the regular production employees. None of the above for the reasons stated should be included in the same bargaining unit with the production employees."

In case after case, the same principle was applied:

Burnside Steel Foundry, 7 N.L.R.B. 714 (June 17, 1938);

Southport Petroleum Co., 8 N.L.R.B. 792 (August 4, 1938);

Elliott Bay Lumber Co., 9 N.L.R.B. 3 (October 1, 1938);

Ingram-Richardson Mfg. Co., 9 N.L.R.B. 200, 204 (October 14, 1939);

Inland Steel Co., 9 N.L.R.B. 783, 790 (November 12, 1938);

Southern California Gas Company, 10 N.L.R.B. 1123 (January 14, 1939);

F. E. Booth Co., 10 N.L.R.B. 1491 (January 30, 1939);

Automotive Maintenance Co., 13 N.L.R.B. 338 (June 21, 1939);

Armour & Co., 13 N.L.R.B. 1143 (July 25, 1939);

American Machine & Foundry Co., 14 N.L.R.B. 497 (August 14, 1939);

Magnolia Petroleum Co., 18 N.L.R.B. 380 (December 16, 1939);

Cleveland Hobbing Machine Co., 18 N.L.R.B. 412 (December 18, 1939);

Todd-Johnson Dry Docks Co., 18 N.L.R.B. 973 (December 29, 1939);

Armour & Co., 26 N.L.R.B. 1046 (August 23, 1940).

Then, in a case in which nobody objected to the plan, the Board included in an "appropriate unit" of productive employees eight watchmen employed in an electrical goods factory in Lima, Ohio:

In re Westinghouse Electric & Mfg. Co., 28 N.L.R.B. 799 (December 23, 1940).

Three months later, the same union was (by application of *stare decisis* it seems) given jurisdiction of the guard force at another, much larger plant, against the employer's objections:

In re R.C.A. Manufacturing Co., 30 N.L.R.B. 668 (March 29, 1941).

And later in the same year, the United Automobile Workers Union (C.I.O.) commenced the campaign mentioned above, by attempting to obtain jurisdiction of plant police throughout the automobile industry: see *In re Chrysler Corporation*, 44 N.L.R.B. 881 (October 7, 1942). Other unions soon followed its example, and within a very short time the Board had published the decisions appearing in the long list at the end of its petition here.

Most of the decisions identified on the Board's list are mere election orders, none of which can be reviewed by the Courts under the Act, and many of which have never become effective. They reflect a confusing change in one of the Board's principles, more than they do any real change in real labor relations. But if (as the Board says) these cases reflect also the need for a clarification of its powers and duties under Section 9 of the Act, it is not because the status of militarized plant guards, in time of war only, should be settled here. It is because the Board has been unable to define the nature and limits of its duty to segregate management from labor, even to its own satisfaction, not only in police cases, but also in cases involving foremen and other supervisory agents of every class; and because a settlement of that question is desirable throughout industry.

IV. The Decision of This Case by the Court Below Was Sound and Correct.

In its disposition of this case, the Court below simply applied to the new situation presented here the established principles which must be applied by the Board in all such cases as this, if the limits of its discretion here are those fixed by this Court in decisions relating to other sections of the Act. Thus, the Court below held:

1. That the powers of the Board in the establishment of "appropriate units" under Section 9 of the Act are limited, *inter alia*, by a rule of law that every such unit must be rationally calculated to effectuate the policies of the Act: *Pittsburgh Plate Glass Co. v. N.L.R.B., supra.*

2. That no order made by the Board, under this or any other section of the Act, can be held valid unless it meets two tests: it must effectuate the policies of the Act; and it must do so without at the same time offending or infringing any other equally important statute, law or principle of public policy: *Southern Steamship Co. v. N.L.R.B.*, 316 U. S. 31; 86 L. Ed. 1246 (1942); *Phelps Dodge Corp. v. N.L.R.B.*, 313 U. S. 177; 85 L. Ed. 1281 (1941); *N.L.R.B. v. Delaware-New Jersey Co.*, 128 Fed. (2d) 130 (3 C.C.A., 1942).

3. That the effectiveness of management—or of police authority—is, manifestly and necessarily, prejudiced, if the loyalty and fidelity of the manager (or the policeman) is divided between his employer and his labor union, as it must be when he is obliged to enforce the employer's rules and policies against brother members of the union: *In re Maryland Drydock Co.*, 49 N.L.

R.B. 733 (1943); *In re Budd Wheel Co.*, 52 N.L.R.B. 666 (1943); *N.L.R.B. v. Delaware-New Jersey Ferry Co.*, 128 Fed. (2d) 130 (3 C.C.A., 1942).

4. That, in time of war, the effective management of steel plants is a matter of great public importance; and that the consequent public necessity that steel plants shall have effective guards is shown by the establishment of the force of Auxiliary Military Police.

5. That, as a result, such an order as that involved here is invalid because it tends to defeat the public need for the completest effectiveness and independence of the plant guards involved in this case.

There is, in the foregoing analysis of the matter, nothing which offends any principle of law upon which the Board has any right to rely. The Circuit Court has simply given the Act a reasonable interpretation; and has given the Board, it is submitted, all the scope which Congress intended it should have, by requiring it to draw the line between labor and management at a point which will preserve the proper and desirable functions of the latter.

V. The Case Presents the Same Question as That Presented by the Petition for Certiorari in Jones & Laughlin Steel Corporation v. National Labor Relations Board at No. 1294 October Term, 1944.

In the petition for certiorari in *Jones & Laughlin Steel Corporation v. N.L.R.B.*, now pending here at No. 1294 of the present term, the essential question sought to be presented for review is precisely that which has been discussed. In that case, the National Labor Relations Board granted the petition of a labor union to be

certified as representative of the federally licensed masters of a fleet of registered steam vessels employed in navigation on the Mississippi and Ohio rivers. The employer, the owner of the vessels, was willing to recognize the union, and two other unions which had associated with it, as representatives of all subordinate members of the crews of the vessels, including such supervisory employees as the licensed mates, pilots and marine engineers. However, it opposed inclusion of the masters in the Board's "unit," contending that, to preserve its right of management of the vessels (a matter of great importance under federal laws), particularly during long voyages, it must be assured the undivided loyalty and independence of the master of each vessel. For the soundness of this position under the Act, it found support in the traditions of the maritime calling before 1935; in certain of the earlier decisions of the Board;[9] and in the principles and the decisions[10] relied upon by the Court below in this present case. The Fifth Circuit Court, nevertheless, upheld and enforced an order by which the Board had rejected the employer's contentions, as unjustified by the Act, and had commanded inclusion of the masters within the union's jurisdiction—

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9. *In re United States Lines,* 28 N.L.R.B. 896 (1941); *In re Detroit & Cleveland Navigation Co.,* 29 N.L.R.B. 176 (1941); *In re United Dredging Co.,* 30 N.L.R.B. 739 (1941).

10. Among them, *N.L.R.B. v. Delaware-New Jersey Ferry Co.,* 128 Fed. (2d) 130 (1942) a case cited in the opinion of the Court below and in earlier sections of this brief, in which the Third Circuit Court of Appeals denied the Board the power, under Section 9 of the Act, to require recognition of a labor union as representative of licensed marine officers.

Jones & Laughlin Steel Corporation v. N.L.R.B., 146 Fed. (2d) 833 (5 C.C.A. 1945).

A comparison of the records in the two cases—in this case and the case of the licensed shipmasters—will show that the decisions are in conflict, and that the same rules of law should govern the decisions in both. The efficiency of the merchant marine is as essential to the public good, in time of war, as is the efficiency of the steel industry; the fidelity of the licensed shipmaster is as essential to proper management in the merchant marine as is that of the industrial policeman to proper management in the steel industry; and unionization should have approximately the same effect upon shipmasters, in their dealings with subordinates controlled by the same union, as it has upon industrial police.

In short, if a review by this Court is justified in this case, on the ground that the question presented here is of general importance, the shipmasters' case should be reviewed also. A proper interpretation of Section 9 of the Act must apply as well to one kind of case as to another; and such an interpretation can be settled more reliably if both cases be considered, than if either one be dealt with by itself. The alternative possibility, suggested by the language of the Board's petition, that this Court shall now settle the status of Auxiliary Military Police in time of war; that it shall later settle the status of industrial police when the country is not at war; and that, from time to time and in case after case, it shall advise the Board how to treat each of tens or possibly hundreds of similarly restricted classes of employees, has much less to recommend it, in general principles.

Conclusion.

As the foregoing is intended to show, respondent believes and contends that:

1. The decision of the question of law, described in the Board's petition for certiorari as that which the Board intends to present for review in this case, could have no general or lasting importance; and therefore no writ of certiorari should be granted simply to make possible consideration here of that narrow question.

2. However, if the case be considered as one in which this Court may properly be called upon to interpret Section 9 (b) of the National Labor Relations Act, and to define the rules of law which must govern the Board in decisions establishing "appropriate units" in such cases as this, it does present a question of federal law of the most general and lasting importance, which has not been but which should be decided by this Court.

3. Should the writ of certiorari be granted, to make possible the consideration by this Court of the meaning of Section 9 (b) of the Act, the writ should also be granted in the case of *Jones & Laughlin Steel Corporation v. N.L.R.B.*, now pending at No. 1294 October Term, 1944, in which the same question is presented in slightly different terms.

Respectfully submitted,

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COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

R. C. ATKINS AND COMPANY, *Respondent*

BRIEF OF RESPONDENT, R. C. ATKINS AND COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Filed June 1, 1945.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* v. E. C. ATKINS AND COMPANY, *Respondent.*	No. 1238

BRIEF OF RESPONDENT, E. C. ATKINS AND COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, E. C. ATKINS AND COMPANY, respectfully prays that the Petition of the National Labor Relations Board for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit, entered on February 27, 1945 (*Atkins*, R. 267) be denied.

Answering each of the "Reasons for Granting the Writs," set forth at pages 16 to 29, both inclusive, of the Petition for Writ of Certiorari, the Respondent makes the following contentions:

1. **The Decision in the *Atkins Case*, holding that Militarized Guards are not "employees," does not Conflict with the Decision in the *Federal Motor Truck Company Case* and the *Jones & Laughlin Case*.**[1]

[1] Following the precedent set by the Board in its Brief, record references relating to the records in Cases Nos. 1236, 1237 and 1238 will appear as follows: Federal Motor Truck Company (*Federal*, R. ------); Jones & Laughlin Steel Corporation (*Jones*, R. ------); and E. C. Atkins and Company (*Atkins*, R. ------).

In the *Federal Case* and the *Jones Case,* as well as in the one hundred thirty-five cases cited in Appendix C of the Board's Petition for Certiorari (pages 38-41), the employers conceded that the militarized plant protection employees were "employees"; that they were representatives of management; that they had interests akin to the corporation, rather than to the production employees; and that they were more in the status of supervisors than in the status of fellow production workers. The employers in all such cases, however, sought to bring the militarized plant protection employees concerned within the rule established by the National Labor Relations Board in the first *Maryland Drydock Company Case,* 49 N. L. R. B. 733. In that case, the Board debated as to whether supervisory employees were "employees" within the meaning of Section 2(3), or "employers," within the meaning of Section 2(2), of the National Labor Relations Act. The discussion of the Board upon this point is here set forth in full:

> "So far as the reported decisions of the Board indicate, it was not until 1942, when the Act was in its seventh year, that the Board was called upon to decide whether or not a unit composed entirely of supervisory employees was a unit appropriate for the purposes of collective bargaining as described in Section 9(b). The necessity for deciding this question arose because of the duty imposed upon the Board by Section 9(c), providing in part, 'Whenever a question affecting commerce arises concerning the representation of *employees,* the Board may investigate such controversy and certify . . .' (Emphasis supplied.) In the judgment of the majority of the Board the answer to that question turned upon whether or not supervisors were necessarily to be deemed employees for the purposes of the Act. In determining this question, the majority of the Board

relied primarily upon the statutory definition of 'employee' in Section 2(3), the relevant language of which reads as follows: 'The term "employee" shall include any employee . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.' Because of the broadness of this language and the fact that supervisors were not included among the three enumerated exceptions the inference was drawn that Congress must therefore have intended to cover persons employed in supervisory capacity. There is nothing, however, in the committee reports or in the debates in the House and Senate which would indicate that this specific problem was ever considered by the Congress. Moreover, although there are decisions of the Circuit Courts of Appeals holding that the Board did not err in finding that the discharge of foremen under particular circumstances was a violation of Section 8(3), we have found no Court decisions which hold that units of foremen must be recognized by the Board as being appropriate for collective bargaining. Consequently, the question is still an open one.

While it may be conceded that the question is close, we are no longer convinced that from the mere determination that a supervisor is an employee it follows that supervisors may constitute appropriate bargaining units. Such a theory seems logically to impel the conclusion that all employees not specifically omitted from this subsection fall also within Section 9(b). The Board would then have to hold in each case that the highest corporate officials, including even presidents and general managers, were entitled to be included in appropriate collective bargaining units, since everyone associated with a corporation, except the stockholders and the board of directors, is an employee. Such a construction of the Act ignores the fact that it was passed against

the background of an industrial society in which the vast majority of business enterprises are conducted in the corporate form. While the maxim *inclusio unius est exclusio alterius* is a well-established canon of statutory construction, the courts have recognized its limitation, where its application leads to results so absurd as to make it unreasonable to believe that they were intended by Congress.

Thus the failure of Congress to expressly include 'subordinate officials' within the definition of employees in Section 2(3), particularly when viewed in conjunction with the broad definition of 'employer' in Section 2(2) of the Act, indicates that determination of this type of question is a function reserved to the administrative discretion of the Board. This conclusion is supported moreover by the provisions of Section 9(b) which render it incumbent upon the Board to consider whether the unit alleged to be appropriate in each case will insure to employees the full benefit of their right to self-organization and to collective bargaining and *otherwise effectuate the policies of the Act* (emphasis supplied). In making this determination it is relevant for us to inquire into the status in the managerial hierarchy of the personnel claiming to be an appropriate unit. It is likewise relevant for us to inquire as to the effect that their inclusion will have upon the exercise of the rights of self-organization and collective action of the production employees, and it is further relevant for us to inquire whether our determination in any particular case that supervisory employees constitute a unit appropriate for collective bargaining will so compromise the status of such employees as to result in disruption of the practice of collective bargaining rather than industrial peace." (First *Maryland Drydock Company Case*, 49 N. L. R. B. 733, 737-739.)

It will be seen that the foregoing discussion in no manner doubts that supervisory employees, not to say corporate officers, are "employees," within the common law meaning of the latter word. The decision merely goes off upon the point as to whether it will best effectuate the policies of the Act to establish appropriate bargaining units composed of supervisory employees.

The first *Maryland Drydock Company Case*, 49 N. L. R. B. 733, was decided by a majority of the National Labor Relations Board on May 11, 1943. Depending upon that decision, most of the employers represented in the one hundred thirty-five cases cited by the Board sought to establish that militarized plant guards were supervisory employees acting in the interest of the employer, and consequently not subject to organization in an appropriate bargaining unit under the provisions of the National Labor Relations Act.

The decision of the Board in the first *Maryland Drydock Company Case*, 49 N. L. R. B. 733, was held inapplicable to plant guards because plant guards did not have "the power to hire or discharge other employees, or recommend such action, or otherwise represent management in the area of labor relations and policy."

Second *Maryland Drydock Company Case*, 50 N. L. R. B. 363, 369.
Dravo Corporation Case, 52 N. L. R. B. 322, 327.

In these cases, as in the one hundred thirty-five cases cited by the Board (Petition for Certiorari, pages 37-41) the employers did not contend that the militarized plant protection employees were not employees of the employer, but merely that it would not effectuate the policies of the

Act to constitute them units appropriate for collective bargaining.

The *Atkins Case* is the first case in which an employer contended that militarized plant guards were not "employees" in any common law or statutory sense, irrespective of the policies of the Act.

In the *Atkins Case,* the employer contended that the plant guards, stationed at its two plants, were completely within the control of the military police, and not subject in any respect whatever to the instructions or control of the Board of Directors and officers of the Respondent.

The Circuit Court of Appeals for the Sixth Circuit, therefore, in the *Federal Case* and the *Jones Case,* merely confirmed the ruling of the National Labor Relations Board in the second *Maryland Drydock Company Case, supra,* and the *Dravo Corporation Case, supra,* when it said:

> "In determining an appropriate unit for collective bargaining, the Board is required by Sec. 9(b) to consider whether its order will insure employees the full benefit of their rights to self-organization and collective bargaining, and this involves the inquiry as to who are 'employees,' or to be more specific, whether 'plant protection employees' are entitled to the benefits of the Act. Here, the Board must give consideration to Sec. 2(2) and (3). Subdivision (3) provides that 'the term "employee" shall include any employee * * *,' but subdivision (2) provides that the 'term "employer" includes any person acting in the interest of an employer directly or indirectly * * *.'
>
> Plant protection employees are 'employees' when considered in their relationships to their employer (N. L. R. B. v. Skinner & Kennedy S. Co., 113 Fed.

(2d) 667, 671 (C. C. A. 8)) but we find it difficult to determine that they are 'employers' when their relationship to their fellow employees is considered. However, under the facts pertaining to their duties as hereinafter set forth, we are unable to say that the Board exceeded the limits of its discretion in determining that plant protection employees are entitled to the protection of the Act." (*Federal*, R. 113).

An examination of the record and briefs in the *Federal Case* and the *Jones Case*, if compared with the record and briefs in the *Atkins Case*, will readily illustrate the difference in the contentions of the employers in the three cases.

(a) The Employer Admitted Plant Guards were "employees" in the *Jones Case*.

An examination of the record and briefs in the *Jones Case* discloses that the employer contended its plant guards were its "employees."

(i) Transcript of Record—Case No. 1237.

Page 8—Statement by Mr. Blank, plant manager, that the *watchmen* "have interests so akin to that of the Corporation that it was, as late as December 11, 1942, the desire of both the Corporation and the Union to have these people serve management's interest without other affiliation."

Page 77—Letter from Mr. Blank to the Union —"it is our intention to use every legal means available to us to have plant guards classified with Super-

visors in respect to collective bargaining."

Page 78—Bulletin Board Notice—

"Jones & Laughlin Steel Corporation has consistently maintained that supervisors and plant guards *should not* be included in bargaining units because both groups represent management in safeguarding the Corporation's property and maintaining order and discipline among its employees.

"Because our plant guards, like our supervisors, have been regarded as members of the management's staff, they have been expressly excluded from all our union agreements. Plant guards, as an arm of management, have always been maintained as an effective, responsible, and efficient organization. The responsibilities of plant guards to management are essentially the same as peace officers' duties to the Governor of a State or the Mayor of a City. Management could no more operate efficiently without plant guards responsible solely to it than public officials could operate without their sworn peace officers."

Page 94—Respondent's Exceptions to Intermediate Report—

"Inasmuch as a corporation can act only through individuals, all of whom are employes of the corpora-

tion, such employes acting in that capacity are deemed to be within Section 2(2) of the Act. The plant guards at the Otis Works of the Corporation represent management by enforcing the rules and regulations of the Corporation, protecting corporate property, and making confidential investigations for the Corporation and various governmental agencies. Hence, any construction of the Act that would make a finding that plant guards are employees within the meaning of Section 2(3) of the Act, would in effect deprive management of a class of those employees who can and do properly act *in the interest of the employer.*"

(ii) **Brief for Jones & Laughlin Steel Corporation in the Sixth Circuit Court of Appeals.**

Page 9—Statement of Board's position and employer's position. The employer concedes "that plant guards are 'employees' within the meaning of the Act, for many purposes."

Pages 28—

29—"It has never been contended that the managerial force of any industrial enterprise is entitled either to vote in Board elections, or to be represented by unions—least of all by the same unions which represent productive labor."

(iii) **Brief of Chrysler Corporation as *Amicus Curiae.***

Page ii—The Question Involved—

> "May the National Labor Relations Board apply other tests for determining whether plant protection patrolmen are 'employers' or are 'employees' with whom the Respondent must bargain under the National Labor Relations Act, instead of applying the one test that Congress expressly prescribed, namely, whether or not they act in the interest of the employer in dealing with employees?"

(b) **The Employer Admitted Plant Guards were "employees" in the *Federal Case.***

An examination of the record and briefs in the *Federal Case* discloses that the employer contended its plant guards were its "employees."

(i) **Transcript of Record—Case No. 1236.**

Page 25—Decision and Direction of Election—

> "The Company argues that in normal times the duties of the plant-protection employees are such that these employees are part of the managerial and supervisory arm of the Company. • • • The Company asserts that in times of industrial strife these employees must necessarily be aligned with management because of their duties."

Page 35—Statement of Mr. Meder—

"The position of the Federal Motor Truck Company is, *in the first place,* that the Plant Protection men are a part of the supervision, part of management."

Page 53—Testimony of Mr. Lutton—

"Q. In other words, you do the employment subject to the discretion of the army to discharge them, if they so see fit?

A. That is correct.

Q. Has the army exercised its discretion with respect to any of your 18 Plant Protection employees?

A. No, it hasn't.

Q. You have control over your Plant Protection employees insofar as regulating their hours of work, is that correct?

A. Correct.

Q. Their wages?

A. Correct.

Q. Assignment to shifts or posts?

A. That is correct.

Q. And you have the right to discharge them or discipline them, is that correct?

A. That is correct."

(ii) **Brief for Federal Motor Truck Company.**

Page 0—Statement of Questions Involved—

"1. Are the members of respondent's Militarized Plant Protection Force 'employees' of respondent as 'employees' are defined in the National Labor Relations Act? *The respondent asserts that they are its employees,* but are not entitled to the benefits and sanctions of the Act in respect to collective bargaining."

Page 2—The answer of the respondent is analyzed, emphasizing that the plant protection "employees" are part of supervision.

Page 12—Argument of Law—

"Supervisory employees are not entitled to the benefits and sanctions of Section 9 of the National Labor Relations Act, and are not appropriate units for collective bargaining under that Act."

Page 17—The plant guards "are, in effect, the eyes of the employer. Through these plant guards the employer sees the plant conditions and the conduct of the workmen. They are also one of the hands or agencies through which management deals with the plant and workmen conditions."

Page 18—Effect of Militarization—

> "We have made no point that the fact of militarization alone changed the status of these men from rank and file workmen to supervision. Militarization alone did not accomplish that. * * * Duties and responsibilities were added and they were new duties to the employer and new responsibilities as to the observance and correction of the conduct and work of the rank and file workmen."

(iii) **Brief of Chrysler Corporation as *Amicus Curiae.***

Page ii—The Question Involved—

> "May the National Labor Relations Board apply other tests for determining whether plant protection patrolmen are 'employers' or are 'employees' with whom the Respondent must bargain under the National Labor Relations Act, instead of applying the one test that Congress expressly prescribed, namely, whether or not they act in the interest of the employer in dealing with employees?"

(c) **The Employer-Respondent Contested the Board's Claim that Plant Guards were "Employees" in the *Atkins Case*, and the Uncontroverted Evidence Established such Plant Guards were not Employees.**

(i) **Transcript of Record—Case No. 1238.**

Page 107—PANTZER: So that your obligations to carry out specific tasks are

directed by Capt. Wetenhall, Lt. Scanlon, Chief Johnston, the four lieutenants under Chief Johnston, and the Military regime that you are working with?

GANN: That's right.

Page 111—PANTZER: The Captain we referred to there is Capt. Wetenhall who signs all major orders down in Cincinnati?

GANN: That is right.

Page 106—PANTZER: Well, these special orders then relate to your military duties?

GANN: That's right.

PANTZER: By whom are they issued?

GANN: They are issued by the company commander.

PANTZER: Who is the company commander?

GANN: Mr. Wetenhall, of course, of the Government. I mean now the Government issues the general orders, but I mean we get all of the dope, procedure, from Mr. Wetenhall pertaining to the Auxiliary Military Police. The general orders originate from the Company.

Pages 106—107 PANTZER: And when you said "company orders" you did not mean the E. C. Atkins Company, but the

military company to which you belong? They are the lieutenants, the assistant chief, the chief, and then Lt. Scanlon and Capt. Wetenhall.

GANN: Well, that's true.

PANTZER: Special orders come from that company?

GANN: What I meant was they are different from the general orders in this way, that they apply to a particular post while the general orders are for the whole guard in general.

PANTZER: So that your obligations to carry out specific tasks are directed by Capt. Wetenhall, Lt. Scanlon, Chief Johnston, the four lieutenants under Chief Johnston, and the military regime that you are working with?

GANN: That's right.

Page 125—RICHARDSON: Suppose Mr. Atkins came out and gave you an order. Would you obey that?

JOHNSTON: I never got an order.

RICHARDSON: If you did, would you obey that order?

JOHNSTON: Well, I wouldn't consider it an order, in the first place. If I could oblige him in any way, without violating federal orders, I would do my best to cooperate with him, but I wouldn't have an order from him in the first place.

Page 123—PANTZER: Do any of the Military Police under your command take any orders from any officer, director, or agent of the Atkins company as such?

JOHNSTON: No, they wouldn't take any orders. Just like myself, they would cooperate in any way they could, but they would only—

PANTZER: Suppose such cooperation involved deviation from such specific order which you had to give. Would they follow your specific order or would they cooperate?

JOHNSTON: They would—that would be their orders—to follow mine, yes, sir.

(ii) **Brief of Employer-Respondent Filed in the Seventh Circuit Court of Appeals.**

The plant guards of the Respondent, E. C. Atkins and Company, in the instant case, perform the following **functions**: They guard the plant (Gann, 1R.A.6); obey the three general guard orders and specific orders which the Military Police Company asks the plant guards to obey (Gann, 1R.A. 6; Johnston, 1R.A. 21, 26, 27); watch for suspicious circumstances around the plant (Gann, 1B.A. 42); look for fires (Gann, 1B.A. 42); observe production workers (Gann, 1R.A. 6-7); report misfeasances of production workers (Gann, 1R.A. 7); report sabotage (Gann, 1R.A. 7); report violation of orders (Gann, 1R.A. 12; Johnston, 1R.A. 23); direct trucks entering the plant (Gann, 1R.A. 14); supervise employees entering the plant (Johnston, 1R.A. 24); supervise passage of employees within the

plant (Johnston, 1R.A. 25); and suspend production employees for drunkenness (Johnston, 1R.A. 32).

The evidence as to the performance of such foregoing **functions** by the plant guards stationed at the Respondent's two plants was undisputed. To argue, however, that similarity or even identity of **functions** between the plant guards in the *Phelps-Dodge, Chrysler* and *Dravo Cases,* and the plant guards in the instant case proves the plant guards in the instant case are "employees" of the Respondent, is to perpetrate a logical fallacy. It would be just as illogical to argue that inasmuch as the man who performs the function of driving a motor vehicle for a certain corporation is its "employee," that therefore all persons who drive motor vehicles are "employees."

As a matter of fact the evidence of **function** takes up less than five per cent of the total verbal testimony adduced at the hearing in the Representation Case. The real issue raised by the pleadings, briefs, and oral argument was whom the plant guards were **representing** in performing these **functions.** All the testimony of the witnesses for the Respondent was directed toward establishing that the **functions** of the Respondent's plant guards were performed as "representatives" of the military authorities and not as "representatives" of the Respondent, and as will appear from the Record, Gann and Richardson, the two witnesses for the Board, agreed completely with the testimony of Johnston and Wood, the two witnesses of the Respondent, on this point. (Brief for Respondent in 7th C.C.A. p. 20-22.)

An analysis of the Records and the Decisions in the three cases, therefore, completely refutes the first basis for certiorari advanced by the Board.

(d) **The Decision in the *Atkins Case* Does Not Contravene the Decision of the Supreme Court in the *Hearst Case*.**

The Board says at page 19 of its Petition for Certiorari:

> "The evidence shows that the guards' duties, functions, obligations, and relationship with the management were not different in the *Atkins* case from those existing in the 'typical' plant guard cases (*supra*, p. 17). The Seventh Circuit apparently was of the view that the fact that the chief guard, a company employee who exercised control over the other guards in the performance of their day to day duties (*supra*, p. 11), regularly received orders from the military authorities rather than from Company management (*Atkins*, R. 47, 117-120, 123) offset the other considerations weighed by the Board. But as this Court held in the *Hearst* case, *supra*, 322 U. S. at 128, 'control of "physical conduct in the performance of the service" • • • the traditional test of the "employee relationship" at common law,' is not the predominant test under the Act."

In making the preceding pronouncement, the Board does violence to the opinion of Mr. Justice Rutledge and the ruling in the *Hearst Case*.

It will be recalled that Mr. Justice Rutledge felt "the record sustains the Board's findings and there is ample basis in the law for its conclusion." (322 U. S. 132.)

It will be necessary to examine the actual decision of the National Labor Relations Board in the *Hearst Case* in order to see how much the opinion of Mr. Justice Rutledge confirmed the finding of the Board that *control and direction*

were the principal criteria in establishing the employee-employer relations in the *Hearst Case*. After indulging in a twelve page analysis of the "Status of the Newsboys Involved in this Proceeding," in which all facts respecting the status of the Newsboys were considered, the Board made the two following pronouncements:

> "On the basis of the foregoing, we are of the opinion that the Companies have the right to exercise, and do exercise, such control and direction over the manner and means in which the newsboys perform their selling activities as establishes the relationship of employer and employee for the purposes of the Act." (28 NLRB 1022-3).
>
> "We • • • hold upon this record that the newsboys herein involved are within the definition of employees as the term is used in this Act. Accordingly, we find that the newsboys involved in this proceeding are employees within the meaning of Section 2(3) of the Act." (28 NLRB 1024).

The Respondent further calls attention to the following quotation at page 18 of the Board's Petition for Certiorari:

> "Plainly when the War Department, which created the Auxiliary Military Police, provided expressly that the guards' compensation was to be determined between the guards and the management, that the guards were to remain subject to the usual social security, workmen's compensation and employer's liability provisions applicable to employees, and that they were to be 'permitted to bargain collectively,' it manifested its understanding that they continued to be employees for purposes of labor relations and other labor legislation."

Again the Board has failed to note the dissimilarity between the facts in the *Atkins Case* and those in the

Hearst Case. Mr. Justice Rutledge points out in the latter case that:

> "there is either no evidence in the record to show, or the record explicitly negatives, that respondents carry the newsboys on their payrolls, pay 'salaries' to them, keep records of their sales or locations, or register them as 'employees' with the Social Security Board or that the newsboys are covered by workmen's compensation insurance or the California Compensation Act." (322 U. S. 119, Footnote 17.)

The *Hearst Case* stands for one thing, and one thing alone—namely, that the Board must look at the actual facts of control and supervision, rather than fictions, in determining whether plant guards are, or are not, employees of the corporation where they are stationed.

2. **The Decision in the *Atkins Case* Holding that It Will Not Effectuate the Policies of the Act to Require the Employer to Bargain with Militarized Guards is in Complete Accord with the Decision in the *Federal Motor Truck Company Case* and the *Jones & Laughlin Steel Corporation Case.***

The Seventh CCA decided the *Atkins Case* upon two grounds, the second of which was that it would not effectuate the policies of the National Labor Relations Act to require the Atkins Company to bargain with the plant guards stationed at its plants. This was a separate and independent ground of decision, the Court saying:

> "The further question, closely related to the one we have just decided, is whether the Board's order requiring respondent to bargain with the Union should be enforced. In considering this question,

we assume, contrary to our holding, that members of the military guard are employees of respondent." (*Atkins* R. 265).

The Seventh CCA then goes on to say:

> "In the recent cases of N. L. R. B. v. Jones and Laughlin Steel Corp. and N. L. R. B. v. Federal Motor Truck Co., decided December 8, 1944 (Circuit Court of Appeals, 6th Circuit), the court in denying enforcement orders under a situation similar to that of the instant case said:
>
> 'The national welfare is of supreme importance and especially is this true in time of war. The evidence reflects the deep concern of the Government for the maintenance and protection of respondents' plants and for the integrity and volume of their products. * * * It must be kept in mind that in time of national peril, the preservation, protection and promotion of the national welfare is the paramount objective; and the Board must select bargaining agents with this in view.'
>
> "We agree with the statement just quoted. Nothing should be permitted which will interfere in any degree or to any extent with the obligation which these guards have with the military. Membership in a union with the right to bargain might, in fact is likely to, do that very thing. To so state is not to cast any reflection upon the patriotism of the guard members. It is merely a recognition of that which is a matter of common knowledge." (*Atkins,* R. 266).

Inasmuch as the decision in the *Atkins Case* can be rested upon the same ground as the decision in the *Federal Case* and the *Jones Case,* basis for certiorari does not exist under the first ground alleged in support of the Board's petition.

3. **The Decision in the *Atkins Case* Does Not "Overturn" the Board Policy which, for a Period of Nearly Three (3) Years Has Effected Stable Conditions in a Large and Difficult Area in Labor Relations.**

As has already been pointed out the facts in the one hundred thirty-five cases cited by the Board in its Petition for Certiorari (pp. 38-41) are facts in which the Employer conceded that the plant guards were "employees," but contended that it would not effectuate the policies of the Act to require the employer to bargain with them.

The decision in the *Atkins Case* is based upon facts and contentions which did not exist and were not made in the one hundred thirty-five decisions referred to.

4. **Demilitarization of the Plant Guards at the Atkins Plant Constitutes the Further Prosecution of the *Atkins Case* a Moot Case.**

It is pointed out in the Board's Petition for Certiorari that the guard forces at the two Atkins plants were demilitarized on January 6, 1944 and March 7, 1944. This demilitarization renders the *Atkins Case* moot.

Unlike the Unions in the *Federal Case* and the *Jones Case*, the plant guard unit in the *Atkins Case* comprised militarized plant guards stationed at the Curtiss-Wright Corporation, Merz Engineering Company, Marmon-Herrington Company, and International Machine and Tool Company. (*Atkins*, R. 111-12.) There is no evidence that the plant guards at these latter four plants have been demilitarized. The plant guard local cannot, therefore, properly be said to be the representative of the demilitarized guards at the Atkins Plant. A new certification of proper

representatives will therefore have to be made by the Board before the unit in which the plant guards at the Atkins Plant are to be included can be established.

Furthermore the decision in the *Atkins Case*, which is unique upon its facts—facts which are not to be confused with the facts in the one hundred thirty-five decisions cited by the Board—will in no wise determine further procedure in any of the 3,000 other plants, still maintaining militarized guards, to which the Board makes reference in its brief. From all that appears in such brief, the employers in such plants admit that the plant guards are their employees but take the position that it will not further the purposes of the Act to bargain with them.

5. The Petition for Certiorari should be Dismissed for Improper Joinder.

The three Petitions for Certiorari in Cases Nos. 1236, 1237 and 1238 are improperly joined for the following reasons:

(a) **There is no Similarity of Facts between the *Federal Case* and the *Jones Case* on the one Hand, and the *Atkins Case* on the Other Hand. The National Labor Relations Board is merely trying, by confusing the facts in the *Atkins Case* with those in the other two Cases, to have the *Atkins Case* Dragged into the Supreme Court along with the other two Cases.**

(b) **The Board did not even serve upon Counsel for Respondent copies of the Transcripts of Record in the *Federal Case* and the *Jones Case*. It was only after counsel pointed out to the Board the great number**

of record references contained in the Petition for Certiorari to the other two records that Temporary Loans of such Records were obtained from the Board.

(c) By the misjoinder, complained of, the Board seeks to have this Honorable Court consider, in the *Atkins Case,* evidence introduced in the other two cases, such as, for instance, certain Regulations promulgated by subordinates of the War Department (*Federal,* R. 75-96), which were not introduced in the *Atkins Case,* and vice versa. Each of the cases should be considered upon its own Facts.

6. **The Respondent Requests Leave to Reserve Certain Points Not Presented by the Petition for Certiorari, if the latter is granted.**

In the event the Petition for Writ of Certiorari is granted, the Respondent begs leave of this Honorable Court to argue the following points connected with the *Atkins Case:*

(a) **The Respondent's Petition for Leave to Adduce Additional Evidence. (Respondent's Pleadings, pp. 23-32.)**

(b) **The impropriety of taking Judicial Knowledge of the War Department Regulations, as taken by the Circuit Court of Appeals for the Seventh Circuit.** (*Atkins,* R. 253.)

(c) **The impropriety of the Board's finding that "contentions, advanced in other cases, such as the *Chrysler Case,* the *Phelps Dodge Case,* and the *Dravo Corporation Case,* that plant guards were**

supervisory employees and therefore not the subject matter of collective bargaining, had been made in the *Atkins Case*, and that consequently the decision in the *Atkins Case* should follow the decision in the other cases."

(d) The error of the Board in impressing its order with a scope not justified by the facts in contravention of the decision of this Honorable Court in *NLRB v. Express Publishing Company*, 213 U. S. 426, 433 (1941), and the decision of the Seventh Circuit Court of Appeals in *McQuay-Norris Manufacturing Co. v. NLRB*, 119 F. (2d) 1009 (1941).

7. **Conclusion.**

The decision of the Seventh Circuit on the question of employees' status does not on the facts conflict with the decisions of the Sixth Circuit; and the principal ground of decision of the Seventh Circuit coincides with those of the Sixth Circuit.

It is, therefore, respectfully submitted that the Petition for Writ of Certiorari in this case should be denied.

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No. 1236. NATIONAL LABOR RELATIONS BOARD *v.* FEDERAL MOTOR TRUCK CO.;

No. 1237. NATIONAL LABOR RELATIONS BOARD *v.* JONES & LAUGHLIN STEEL CORP. On petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit; and

No. 1238. NATIONAL LABOR RELATIONS BOARD *v.* E. C. ATKINS & Co. On petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. June 4, 1945. *Per Curiam:* The petition for writs of certiorari is granted. The judgments are vacated and the cases are

remanded to the respective Circuit Courts of Appeals for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved, and the effect thereof on the Board's orders. *Assistant Solicitor General Cox* and *Mr. Alvin J. Rockwell* for petitioner. *Mr. Percy J. Donovan* for respondent in No. 1236. *Messrs. William A. Seifert* and *John C. Bane, Jr.* for respondent in No. 1237. *Messrs. Roscoe Pound* and *Kurt F. Pantzer* for respondent in No. 1238. Reported below: Nos. 1236 and 1237, 146 F. 2d 718; No. 1238, 147 F. 2d 730.